No.

In the Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
PETITIONERS

v.

STATE OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
PETITIONERS

v.

NEW YORK IMMIGRATION COALITION, ET AL.

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
DEFENDANTS

18-CV-5025 (JMF)
(Consolidated)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
DEFENDANTS

Filed: Jan. 15, 2019

FINDINGS OF FACT AND CONLCUSIONS OF LAW

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JESSE M. FURMAN, United States District Judge:

The Constitution provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." U.S. Const. amend. XIV, § 2. To that end, it mandates that an "actual Enumeration" be conducted "every . . . ten Years, in such Manner as [Congress] shall by Law direct," an effort commonly known as the census (or, more precisely, the decennial census). *Id.* art. I, § 2, cl. 3. By its terms, therefore, the Constitution mandates that every ten years the federal government endeavor to count every single person residing in the United States, whether citizen or noncitizen, whether living here with legal status or without. The population count derived from that effort is used not only to apportion Representatives among the states, but also to draw political districts and allocate power within them. And it is used to allocate hundreds of billions of dollars in federal, state, and local funds. Given the stakes, the interest in an accurate count is immense. Even small deviations from an accurate count can have major implications for states, localities, and the people who live in them—indeed, for the country as a whole.

Since its inception in 1790, the decennial census also has been used for another purpose: to collect demographic data about the population of the United States, including information about respondents' race, sex, and age, and whether they own or rent their homes. Most relevant here, the government collected data about people's citizenship status from all households in the

country in every census between 1820 and 1950 (with the exception of 1840). In 1960, however, the government stopped asking a citizenship question of every respondent, and for decades thereafter the official position of the Census Bureau was that reintroducing such a question was inadvisable because it would depress the count for already "hard-to-count" groups—particularly noncitizens and Hispanics—whose members would be less likely to participate in the census for fear that the data could be used against them or their loved ones. Every Secretary of Commerce (to whom Congress has long delegated significant authority over the census) adhered to that position—until early last year. On March 26, 2018, Secretary of Commerce Wilbur L. Ross, Jr. announced that he was reinstating the citizenship question on the 2020 census questionnaire, purportedly in response to a request from the Department of Justice ("DOJ") for better citizenship data to assist in its enforcement of Section 2 of the Voting Rights Act of 1965 ("VRA"). *See* 52 U.S.C. § 10301. He did so over the strenuous objections of the Census Bureau itself, which warned that adding a citizenship question would harm the quality of census data and increase costs significantly and that it would do so for no good reason because there was an alternative way to satisfy DOJ's purported needs that would not cause those harms.

The question in these consolidated cases is whether Secretary Ross's decision to reinstate the citizenship question, and the process leading to that decision, violated provisions of statutory or constitutional law. Two sets of Plaintiffs—one, a coalition of eighteen states and the District of Columbia, fifteen cities and counties, and the United States Conference of Mayors (the

"Governmental Plaintiffs"), and the other, a coalition of non-governmental organizations (the "NGO Plaintiffs")—challenge the decision on two principal grounds. First, they contend that the decision violated the Administrative Procedure Act ("APA"), which, among other things, prohibits federal agencies from acting in a manner that is arbitrary and capricious or not in accordance with law. Second, they allege that the decision violated the Due Process Clause of the Fifth Amendment because it was motivated in part by invidious discrimination against immigrant communities of color. Defendants—the United States Department of Commerce; Secretary Ross (the "Secretary"); the Bureau of the Census (the "Census Bureau"); and the Director of the Census, Dr. Steven Dillingham[1]—have tried mightily to avoid a ruling on the merits of these claims. They asserted a slew of unsuccessful jurisdictional arguments, raised multiple challenges to this Court's decisions authorizing discovery beyond the administrative record collected and filed in this litigation (one of which is still pending before the United States Supreme Court), and tried no fewer than fourteen times to halt the proceedings altogether. Between November 5 and 27, 2018, however, this Court held—and completed—an eight-day bench trial to resolve Plaintiffs' claims, taking direct testimony by affidavit from many witnesses and orally from others.

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[1] Dr. Ron S. Jarmin served as Acting Director of the Census throughout the period relevant to this litigation and was originally named as a Defendant in his official capacity. *See* Docket No. 1. On January 2, 2019, however, Dr. Dillingham was confirmed as Director of the Census, and was substituted for Dr. Jarmin as a Defendant. *See* Docket No. 573.

This Opinion contains the Court's findings of fact and conclusions of law following that trial. Broadly speaking, the Court reaches three legal conclusions. *First*, the Court holds that most, if not all, of Plaintiffs have standing to bring their claims. Specifically, they have proved by a preponderance of the evidence that they will be harmed in various ways as a result of the addition of a citizenship question on the census and that a favorable ruling here will redress those harms. Defendants' own documents and expert witness confirm that adding a citizenship question to the census will result in a significant reduction in self-response rates among noncitizen and Hispanic households. And expert testimony, based in large part on the Census Bureau's own analyses of past censuses, indicates that the Census Bureau's "Non-Response Follow Up" procedures, extensive though they will be, are unlikely to remedy that reduction in self-response rates, which means that hundreds of thousands—if not millions—of people will go uncounted in the census if the citizenship question is included. The result will not only be a decrease in the quality of census data—something Defendants concede—but likely also a net differential undercount (that is, an undercount of certain sectors of the population, including people who live in households containing noncitizens and Hispanics, relative to others). That undercount, in turn, will translate into a loss of political power and funds, among other harms, for various Plaintiffs. In light of these and other factual findings, the Court holds that most, if not all, Plaintiffs have standing to bring their claims.

Second, the Court concludes on the merits that Secretary Ross violated the APA in multiple independent ways. Most blatantly, Secretary Ross ignored, and

violated, a statute that requires him, in circumstances like those here, to collect data through the acquisition and use of "administrative records" *instead* of through "direct inquiries" on a survey such as the census. Additionally, Secretary Ross's decision to add a citizenship question was "arbitrary and capricious" on its own terms: He failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices—a veritable smorgasbord of classic, clear-cut APA violations. On top of that, Secretary Ross acted without observing procedures required by law, including a statute requiring that he notify Congress of the subjects planned for any census at least three years in advance. And finally, the evidence establishes that Secretary Ross's stated rationale, to promote VRA enforcement, was pretextual—in other words, that he announced his decision in a manner that concealed its true basis rather than explaining it, as the APA required him to do. Notably, the Court reaches all of those conclusions based exclusively on the materials in the official "Administrative Record"—that is, the record of materials collected and submitted by Defendants that Secretary Ross allegedly considered, directly or indirectly, prior to making his decision. Looking beyond the Administrative Record merely confirms the Court's conclusions and illustrates how egregious the APA violations were.

Third, on the merits of the constitutional claim, the Court concludes that Plaintiffs did not carry their burden of proving that Secretary Ross was motivated by

invidious discrimination and thus that he violated the equal protection component of the Due Process Clause. In particular, although the Court finds that Secretary Ross's decision *was* pretextual, it is unable to find, on the record before it, that the decision was a pretext *for* impermissible discrimination. To be fair to Plaintiffs, it is impossible to know if they could have carried their burden to prove such discriminatory intent had they been allowed to depose Secretary Ross, as the Court had authorized last September. As defense counsel more or less conceded during closing arguments, a deposition of Secretary Ross would have been the best evidence of the question at the heart of the due process inquiry—namely, the true nature of Secretary Ross's intent in reinstating the citizenship question. But this Court's order authorizing such a deposition was stayed by the Supreme Court pending its further review, *see In re Dep't of Commerce*, — S. Ct. —, 2018 WL 5458822 (Nov. 16, 2018); *In re Dep't of Commerce*, 139 S. Ct. 16 (2018) (mem.), and Plaintiffs made the understandable decision to proceed with trial despite that stay (because, with the clock ticking on census preparations, waiting for a final ruling from the Supreme Court could have cost Plaintiffs a meaningful chance to obtain *any* relief). Be that as it may, it was—and remains—Plaintiffs' burden to prove discriminatory intent, and the evidence in the existing record does not support a conclusion that they carried that burden.

The Court's Opinion is, to put it mildly, long. But that is for good reasons. For one thing, the Court has taken care to thoroughly examine every issue because the integrity of the census is a matter of national importance. As noted, the population count has massive and lasting consequences. And it occurs only once a

decade, with no possibility of a do-over if it turns out to be flawed. *See* Departments of Commerce, Justice, and State, The Judiciary, and Related Agencies Appropriations Act, 1998, § 209(a)(8), Pub. L. No. 105-119, 111 Stat. 2440, 2480-81 (1997) ("1998 Appropriations Act") ("Congress finds that . . . the decennial enumeration of the population is a complex and vast undertaking, and if such enumeration is conducted in a manner that does not comply with the requirements of the Constitution or laws of the United States, it would be impracticable for the States to obtain, and the courts of the United States to provide, meaningful relief after such enumeration has been conducted."). For another, time is of the essence because the Census Bureau needs to finalize the 2020 questionnaire by June of this year. *See* Docket No. 540, at 3; *see also* Brief for Petitioners at 45, *Department of Commerce v. U.S. Dist. Ct. for S.D.N.Y.* (Dec. 17, 2018) (No. 18-557), 2018 WL 6650094, at *45 (noting "the need to finalize the census questionnaire by mid-2019").[2] With time so short and the likelihood that one or both sides will seek appellate relief so high, it is critical to make a comprehensive record in order to facilitate higher court review and to minimize any potential need for a remand. That means reaching most, if not all, issues raised by the parties—even if, in other circumstances, it would be unnecessary or even inadvisable. *See, e.g.*, *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be

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[2] Unless otherwise noted, all citations to the docket are to No. 18-CV-2921.

disposed of."). And in light of Defendants' strenuous objections to consideration of any extra-record discovery —objections they are already pressing before the Supreme Court—it also means spelling out which facts are drawn exclusively from the Administrative Record rather than from other evidence, and which conclusions of law are based solely on the Administrative Record rather than on other evidence.[3]

In short (or not, as the case may be), the Court concludes that Secretary Ross's decision to add the citizenship question to the 2020 census questionnaire, while not inconsistent with the Constitution, violated the APA in several respects. Those violations are no mere trifles. The fair and orderly administration of the census is one of the Secretary of Commerce's most important duties, as it is critical that the public have "confidence in the integrity of the process." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment). And although some may deride its requirements as "red tape," the APA exists to protect core constitutional and democratic values: It ensures that agencies exercise only the authority that Congress has given them, that they exercise that authority reasonably, and that they follow applicable procedures—in short, it ensures that agencies remain accountable to the public they serve. That is not to say—and the APA does not say—that an agency cannot adopt new policies or otherwise change course. But the APA does require that before an agency does so, it must consider all important as-

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[3] There is one more reason for the Opinion's length. To paraphrase a line generally traced to Blaise Pascal: If the Court had more time, its Opinion would be shorter.

pects of a problem; study the relevant evidence and arrive at a decision rationally supported by that evidence; comply with all applicable procedures and substantive laws; and articulate the facts and reasons—the *real* reasons—for that decision. The Administrative Record in these cases makes plain that Secretary Ross's decision fell short on all these fronts. In arriving at his decision as he did, Secretary Ross violated the law. And in doing so with respect to the census—"one of the most critical constitutional functions our Federal Government performs," 1998 Appropriations Act, § 209(a)(5), 111 Stat. at 2480-81, and a "mainstay of our democracy," *Franklin*, 505 U.S. at 818 (Stevens, J., concurring)—Secretary Ross violated the public trust.

BACKGROUND

The Court begins with relevant background concerning the history and purpose of the census, the Secretary's authority over the census, and the history of the citizenship question on the census. The relevant background is largely undisputed (for example, as reflected in stipulations of the parties) or drawn from materials of which the Court can take judicial notice. *See, e.g.*, Fed. R. Evid. 201(b)-(c); *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 298-303 (S.D.N.Y. 2012) (noting that a court may take notice of undisputed historical facts). To the extent that the Court cites trial testimony or exhibits in what follows, it is only by way of background and does not form a basis for any of the conclusions of law later in this Opinion.[4]

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[4] Defendants filed the initial part of the Administrative Record on June 8, 2018. *See* Docket No. 173; *see also id.* Ex. 1. They later filed additional materials, *see* Docket Nos. 189, 212, and stip-

A. History and Purposes of the Census

Article I of the Constitution requires Congress to carry out an "actual Enumeration" every ten years, "in such Manner as [Congress] shall by Law direct." U.S. Const. art. I, § 2, cl. 3. The original and fundamental purpose of this "Enumeration," known as the decennial census, was to apportion congressional representatives (and, where necessary, direct taxes) among the states "according to their respective Numbers." *Id.* For the first eighty years of the country's history, the states' "respective Numbers" were calculated according to a formula mandated by the same constitutional provision's infamous Three-Fifths Clause, which reformulated the "actual Enumeration" established by the census by "adding to the whole Number of free Persons . . . , and excluding Indians not taxed, three fifths of all other Persons"—"all other Persons" being the people then held as slaves. *Id.* (amended 1868). After the Civil War, that provision was superseded by the

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ulated that almost all of their contents, as well as several additional documents, are also part of the Administrative Record. *See* Docket Nos. 523, 524. In general, throughout this Opinion, "AR [Number]" refers to a page or pages in the Administrative Record; "Tr. [Number]" refers to a page or pages of the trial transcript; "PX-[Number]" refers to a Plaintiffs' Exhibit; and "[Name] Dep." refers to a deposition admitted into evidence in part. (To the extent that the Court cites to any deposition testimony to which a party objected, the objection is overruled.) Where possible, citations to the Administrative Record include both "AR" and the relevant Bates stamp number within the Administrative Record productions (e.g., AR 001). Where Bates stamp numbers are unavailable—for instance, for certain trial exhibits that were added to the Administrative Record by stipulation—the Court cites to the source or exhibit directly and includes "(AR)" to signify that it is part of the Administrative Record (e.g., PX-001 (AR)).

Fourteenth Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the *whole number of persons* in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2 (emphasis added). The result is that the Constitution "requires the federal government to conduct a Decennial Census counting the total number of 'persons'—with no reference to citizenship status—residing in each state." Docket No. 480-1 ("Joint Stips."), ¶ 1.

Significantly, although the "initial constitutional purpose" of the census was to "provide a basis for apportioning representatives among the states in the Congress," it has long "fulfill[ed] many important and valuable functions for the benefit of the country." *Baldrige v. Shapiro*, 455 U.S. 345, 353 (1982). In particular, it "now serves as a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country." *Department of Commerce v. United States House of Representatives*, 525 U.S. 316, 341 (1999) (internal quotation marks omitted). *See generally* U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790 TO 2000 ("MEASURING AMERICA") (2002), http://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf. "Today, policy makers at all levels of government, as well as private businesses, households, researchers, and nonprofit organizations, rely on an accurate census in myriad ways that range far beyond the single fact of how many people live in each state." COUNCIL OF ECONOMIC ADVISERS, THE USE OF CENSUS DATA: AN ANALYTICAL REVIEW (2000), https://clintonwhitehouse4.archives.gov/media/pdf/censusreview.pdf. Among other things, the data are used "for such

varied purposes as computing federal grant-in-aid benefits, drafting of legislation, urban and regional planning, business planning, and academic and social studies." *Baldrige*, 455 U.S. at 353 n.9.

Since 1790, the government has conducted the required "actual Enumeration" through questions—initially asked in person by U.S. Marshals and "specially appointed agents" and later by means of written questionnaire—about both the number and demographic backgrounds of those living in each American household. *See* MEASURING AMERICA 125-40. Congress provided for each of the first twelve censuses on an *ad hoc* basis; then, in 1902, Congress established the "Census Office" that it had organized for the twelfth census as a permanent office within the Department of the Interior, to be supervised by a "Director of the Census" appointed by the President and confirmed by the Senate. *See* Act of Mar. 6, 1902 §§ 1-3, Pub. L. No. 57-27, 32 Stat. 51, 51. Shortly thereafter, Congress moved the Census Office into the newly created Department of Commerce and Labor. *See* Act of Feb. 14, 1903 § 4, Pub. L. No. 57-87, 32 Stat. 825, 826-27. Ten years later, various parts of that combined department were transferred into the newly fashioned Department of Labor, and the Census Office was left behind at the slimmed-down (and renamed) Department of Commerce. *See* Act of Mar. 4, 1913 §§ 1, 3, Pub. L. No. 62-426, 37 Stat. 736, 736-37.[5] (Today the "Census

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[5] Pursuant to the Reorganization Act of 1949, Pub. L. No. 81-109, 63 Stat. 203, President Truman transferred "all functions of the Department of Commerce and all functions of all agencies and employees of such Department" to the Secretary of Com-

Office" is known as the "Bureau of the Census," or the "Census Bureau.") In 1954, Congress enacted the various census-related statutes codified in Title 13 into positive law, *see* Act of Aug. 31, 1954, Pub. L. No. 83-740, 68 Stat. 1012, and has enacted all subsequent revisions to the census statutes as amendments to Title 13, which, as a result, is known colloquially as the "Census Act."

The modern decennial census is administered exclusively through a "short-form" questionnaire—a short questionnaire containing only a handful of questions. This is a relatively recent phenomenon. Beginning in 1960, and until 2000, each census also included a "long-form" questionnaire, which contained many additional questions but was sent to only a sample fraction of the population. *See* MEASURING AMERICA 72. In 1960, twenty-five percent of households received the "long-form" questionnaire, while the remainder received the "short-form." *Id.* In the 1970 and subsequent censuses, approximately one-sixth of all households received the "long-form" questionnaire. *See* Joint Stips. ¶ 31. During that time, none of the short-form questionnaires included a question about citizenship or birthplace, al-though the long-form questionnaires each did. *See* Joint Stips. ¶¶ 30, 35. After the 2000 census, the Census Bureau introduced a new survey instrument, the American Community Survey ("ACS"). Joint Stips. ¶ 37. Unlike the decennial census questionnaires, the ACS is conducted annually and not used to enumerate the population for apportionment purposes. It is distributed to about 3.5 million households (approximately

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merce. *See* Reorganization Plan No. 5 of 1950, 15 Fed. Reg. 3174 (May 25, 1950).

two percent of households in the country) each year, for the sole purpose of collecting demographic data about the population. Since its inception, the ACS has included a question on citizenship. Joint Stips. ¶¶ 38-41. With the advent of the ACS, the Census Bureau phased out the "long-form" decennial census questionnaire. Joint Stips. ¶ 37; *see* JENNIFER D. WILLIAMS, THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 3 (2011), https://www.census.gov/history/pdf/2010-background-crs.pdf. Thus, the 2010 decennial census included only a single "short-form" questionnaire, distributed primarily by mail. *Id.* So too, the 2020 census will be conducted with a single short-form questionnaire, which, for the first time, many respondents will complete online. *See* Tr. 1091.

The modern decennial census begins with a Master Address File ("MAF"), a database containing every known housing unit in the country. *See* 83 Fed. Reg. 26643, 26644 (June 8, 2018). Every household is then given the opportunity to self-respond to the census questionnaire. Joint Stips. ¶ 7. A majority of households self-respond to that questionnaire. To attempt to count the households that do not self-respond, the Census Bureau uses a set of procedures known as "Non-Response Follow-Up" or "NRFU." Joint Stips. ¶ 8. The first step in NRFU is an in-person visit from a census enumerator. Assuming that a household is listed in the MAF—a precondition for any NRFU efforts—a NRFU enumerator will visit any nonresponding household in person and, if possible, conduct the census survey face-to-face. In the 2020 census, if the NRFU enumerator's first visit is unsuccessful, but the Census Bureau believes the housing unit to be occupied, the Census Bureau will then refer to "administrative records"

—data collected from other federal or st. te entities —to enumerate that household, assuming administrative records of sufficient quality exist. Joint Stips. ¶¶ 9-10; 83 Fed. Reg. at 26649. If the household cannot be enumerated with high-quality administrative records, a NRFU enumerator will return to the household for at least two more in-person attempts. Joint Stips. ¶¶ 10-11. After three unsuccessful attempts to contact a member of the household in person, the NRFU enumerator will return and attempt to gather information from a "proxy," such as a neighbor or landlord, who can report what he or she knows about the household and its members. Joint Stips. ¶¶ 11-13; 83 Fed. Reg. at 26649. Finally, if enumeration-by-proxy fails, the Census Bureau will then "impute" either the number of household members or their characteristics (or both) based on already-existing data from the area. *See* AR 1281-82, 1304. In other words, the Census Bureau will use a formula to extrapolate what it does not know about the population from what it already knows. *See* Tr. 1351. Because NRFU data is less accurate than self-response data, *see* AR 1281, the Census Bureau places a high priority on obtaining self-responses from as many households as possible, *see* AR 163-65. To that end, the Census Bureau partners with local organizations (which it refers to as "Trusted Partners") to encourage local households to self-respond. Joint Stips. ¶¶ 26, 28.

B. The Secretary's Authority Over the Census

Since Congress first delegated its census-related authority to an Executive Branch official, it has retained some control over the design and administration of the census. The first permanent delegation, for ex-

ample, provided that the decennial census "shall be restricted to inquiries relating to the population, to mortality, to the products of agriculture and of manufacturing and mechanical establishments" and that the tabulations of population "shall comprehend for each inhabitant the name, age, color, sex, conjugal condition, place of birth, and place of birth of parents, whether alien or naturalized, number of years in the United States, occupation, months unemployed, literacy, school attendance, and ownership of farms and homes." Act of Mar. 3, 1899 § 7, 30 Stat. 1014, 1015. Within those broad confines, however, Congress provided that "the Director of the Census may use his discretion as to the construction and form and number of inquiries necessary to secure information." *Id.*

In 1976, Congress amended Title 13 substantially. *See* Act. of Oct. 17, 1976 ("1976 Census Act"), Pub. L. No. 94-521, 90 Stat. 2459 (codified in scattered sections of 13 U.S.C.). Among other things, the 1976 Census Act amended Section 141(a) of Title 13 to update and consolidate its delegation of authority over the census to the Secretary of Commerce. *See id.* § 7(a), 90 Stat. at 2461 (codified at 13 U.S.C. § 141(a)). Section 141(a) now provides:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

13 U.S.C. § 141(a). That delegation now sits alongside Section 5 of Title 13, which authorizes the Secretary to "prepare questionnaires," including but not only for the decennial census, and to "determine the inquiries, and the number, form, and subdivisions thereof." 13 U.S.C. § 5.

Along with—and within—that broad delegation, however, the 1976 Census Act also constrained the Secretary's delegated authority over the decennial census and its questionnaires in several significant ways. First, by its terms, Section 141(a) itself authorized the Secretary to collect information "other" than population information only "as necessary." *Id.* § 141(a). Second, and significantly, Congress added a new subsection to Title 13's Section 6, which had previously merely authorized the Secretary to acquire and use "pertinent" information from other federal, state, and local authorities for the purpose of gathering census-related data. *See* 13 U.S.C. § 6 (1970). The new subsection—Section 6(c)—added that, "[t]o the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary *shall* acquire and use information available from any source referred to in subsection (a) or (b) of this section *instead* of conducting direct inquiries." 1976 Census Act § 5(a), 90 Stat. at 2460 (codified at 13 U.S.C. § 6(c)) (emphases added).

At the same time, Congress also cabined the Secretary's authority to collect data—other than for the straightforward purpose of counting whole persons for apportionment purposes—through nationwide inquiries of the whole population. Whereas Section 195 of Title 13 had previously merely authorized data collec-

tion through statistical sampling, the 1976 Census Act amended that provision to state that, "[e]xcept for the determination of population for purposes of apportionment of Representatives in Congress among the several States, the Secretary *shall*, if he considers it feasible, authorize the use of the statistical method known as 'sampling' in carrying out the provisions of this title." 1976 Census Act § 10, 90 Stat. at 2464 (codified at 13 U.S.C. § 195) (emphasis added); *see Department of Commerce*, 525 U.S. at 341 (noting that the new Section 195 "changed a provision that *permitted* the use of sampling for purposes other than apportionment into one that *required* that sampling be used for such purposes if 'feasible'"). Thus, the "broad grant of authority given in § 141(a) is informed . . . by the narrower and more specific § 195," *Department of Commerce*, 525 U.S. at 338, and is similarly limited by the narrower and more specific Section 6(c). Thus, together, Sections 6(c) and Section 195 effectively established a new default rule for the collection of census data other than for apportionment purposes: first, the Secretary was to "acquire and use" administrative record data instead of conducting direct surveys "to the maximum extent possible," if consistent with the type of data required, 13 U.S.C. § 6(c); and, second, when conducting surveys, he was required to use statistical sampling "if . . . feasible," instead of asking a question of everyone, *id.* § 195.

That was not all. The 1976 Congress also enacted a new reporting requirement, mandating that the Secretary report to the relevant congressional committees, at least three years before the "census date" for a given census, all "subjects proposed to be included, and the types of information to be compiled." 13 U.S.C.

§ 141(f)(1). Further, no later than two years before the given census date, the Secretary must report to the same congressional committees all "*questions* proposed to be included in such census." *Id.* § 141(f)(2) (emphasis added). Congress authorized the Secretary to diverge from the proposals set forth in those reports, but only if he "finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified," and he submits another report "containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified." *Id.* § 141(f)(3).

Finally, to the extent relevant here, the 1976 Census Act's new constraints on the Secretary's authority built on another important, longstanding constraint: a sharp restriction on the authority to *share* any information gathered in any given data collection effort. With certain limited exceptions, Section 9 of Title 13 provides:

> Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, . . . may . . .
>
> (1) use the information furnished under the provisions of [Title 13] for any purpose other than the statistical purposes for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under [Title 13] can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

13 U.S.C. § 9(a). Moreover, Section 9 categorically forbids *anyone*, "except the Secretary in carrying out the purposes of [Title 13]," from ordering the production of census reports that have been retained by the people who submitted them. *Id.* And it provides that copies of such census materials are both "immune from legal process" and unusable "for any purpose in any action, suit, or other judicial or administrative proceeding," without the person's consent. *Id.* Notably, the Secretary's authority to share data with other federal agencies, including DOJ, is "[s]ubject to the limitations contained in" Section 9 (*and* Section 6(c)). *Id.* § 8(b). More specifically, although the Secretary is authorized to "furnish copies of tabulations and other statistical materials" to other federal agencies, those materials may "not disclose the information reported by, or on behalf of, any particular respondent." *Id.*

In sum, as befits a subject over which the Constitution assigns *Congress* "virtually unlimited discretion," *Wisconsin v. City of New York*, 517 U.S. 1, 19 (1996), Congress has been judicious in its delegation of that authority to the Executive Branch, and it has retained an active role in policing the form, content, and methodology of the census through these and other provisions. That is, even as it has delegated broad authority over the census to the Secretary, Congress has taken care to limit that authority and, with respect to a few topics that it has deemed especially worthy of restraint —such as the use of survey questions instead of administrative records or the practice of asking survey questions of all respondents as opposed to sampling— Congress has enacted clear instructions for the Secretary to follow in carrying out his statutory duties. *Cf. Department of Commerce*, 525 U.S. at 337-39.

C. The History of a Citizenship Question on the Census

As the Court described at length in an earlier Opinion and Order, *see New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766, 776-79 (S.D.N.Y. 2018), the questions posed on the census have ebbed and flowed since the first census in 1790 asked each household about "the sexes and colours of free persons," as well the age of each resident, *see* Act of March 1, 1790 § 1, 1 Stat. 101, 101-02 (1790). Most relevant for present purposes, a question regarding citizenship appeared for the first time on the fourth census in 1820, when Congress directed enumerators to tally the number of "Foreigners not naturalized." Act of March 14, 1820 § 1, 3 Stat. 548, 550 (1820). With one unexplained exception (the 1840 census), a question about citizenship status or birthplace appeared on every census thereafter through 1950. *See New York*, 315 F. Supp. 3d at 776-79. That changed in 1960—the first census after Congress authorized the use of sampling. *Id.* at 778. That year, only five questions were posed to all respondents, concerning the respondent's relationship to the head of household, sex, color or race, marital status, and month and year of birth.[6] In a review of the census several years later, the Census Bureau explained the decision not to ask all respondents about citizenship

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[6] In 1960, a longer questionnaire was sent to a sample of the population with questions regarding respondents' and their parents' birthplaces. *See* MEASURING AMERICA 73-75. Additionally, residents of New York and Puerto Rico were asked about citizenship —the former "at the expense of the State, to meet [now defunct] State constitutional requirements for State legislative apportionment" and the latter, at the request of a census advisory committee, "to permit detailed studies of migration." 1960 CENSUSES OF POPULATION AND HOUSING 10, 130.

as follows: "It was felt that general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory requirement for annual alien registration which could provide the Immigration and Naturalization Service, the principal user of such data, with the information it needed." U.S. BUREAU OF THE CENSUS, 1960 CENSUSES OF POPULATION AND HOUSING: PROCEDURAL HISTORY ("1960 CENSUSES OF POPULATION AND HOUSING") 194 (1966), http://www2.census.gov/prod2/decennial/documents/1960/proceduralHistory/1960proceduralhistory.zip.

Between 1970 and 2000, the Census Bureau used both a short-form questionnaire (containing only a handful of questions), which was distributed to the vast majority of the population, and a long-form questionnaire (containing both the inquiries on the short-form questionnaire as well as additional questions), which was distributed to only a sample of the population. During that time, the long-form questionnaires contained a citizenship question, but the short-form questionnaires did not. *See* MEASURING AMERICA 77-78, 84-85, 91-92, 100-101. In 2010, after the advent of the ACS, the Census Bureau dropped the long-form questionnaire entirely. The 2010 census asked about such matters as "the age, sex, race, and ethnicity (Hispanic or non-Hispanic) of each person in a household," but did not ask about citizenship. WILLIAMS, THE 2010 DECENNIAL CENSUS 3. Thus, the last time that the census asked *every* respondent about citizenship was sixty-nine years ago, in 1950. Notably, that is before the VRA was enacted in 1965. In other words, for all fifty-four years that the VRA has existed, the federal government has *never* had a "hard-count" tally of the

number of citizens in the country. Instead, consistent with the requirement to use statistical sampling techniques "if . . . feasible" for everything other than the constitutionally mandated "actual Enumeration," *see* 13 U.S.C. § 195, the federal government has extrapolated from citizenship data collected from a subset of the population to model data for the population as a whole, *see* WILLIAMS, THE 2010 DECENNIAL CENSUS 3.

Since 1950, the Census Bureau and former Census Bureau officials have consistently opposed periodic proposals to resume asking a citizenship question of every census respondent. In 1980, for example, several plaintiffs (including the Federation for American Immigration Reform, which appears here as *amicus curiae* in support of Defendants, *see* Docket Nos. 75, 179) sued the Census Bureau, contending that the census was constitutionally required to count only citizens. *See Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) ("*FAIR*") (three-judge court). In that litigation, the Census Bureau argued that reinstating a citizenship question for all respondents would "inevitably jeopardize the overall accuracy of the population count" because noncitizens would be reluctant to participate, for fear "of the information being used against them." *Id.* at 568. Likewise, in Congressional testimony prior to the 1990 census, Census Bureau officials opposed reinstating a citizenship question for all respondents, opining that it could cause legal residents to "misunderstand or mistrust the census and fail or refuse to respond." *Exclude Undocumented Residents from Census Counts Used for Apportionment: Hearing on H.R. 3639, H.R. 3814, and H.R. 4234 Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civil Serv.*,

100th Cong. 47-51 (1988) (statement of John G. Keane, Director, Bureau of the Census); *see also Census Equity Act: Hearings on H.R. 2661 Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv.*, 101st Cong. 42-44 (1989) (statement of C. Louis Kincannon, Deputy Director, Bureau of the Census). Before the 2010 census, former Bureau Director Kenneth Prewitt testified before Congress to the same effect. *See Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Representatives?: Hearing Before the Subcomm. on Federalism & the Census of the H. Comm. on Gov't Reform*, 109th Cong. 72 (2005) (statement of Kenneth Prewitt). Just two years ago, four former Census Bureau Directors wrote in an *amicus curiae* brief to the Supreme Court (in a case about the use of total population in intrastate redistricting) that a "citizenship inquiry would invariably lead to a lower response rate to the Census." Brief of Former Directors of the U.S. Census Bureau as *Amici Curiae* in Support of Appellees at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) (No. 14-940), 2015 WL 5675832, at *25.[7]

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[7] The four former Census Bureau Directors continue to oppose addition of a citizenship question. As discussed below, they and two other former Directors wrote to Secretary Ross to express "deep[] concern[]" about the addition of a question without proper testing. AR 8555-56. In addition, five of the six former Directors have filed an amicus brief in support of Plaintiffs in these cases. *See* Docket No. 423-1. The sixth, John Thompson, testified as an expert witness on Plaintiffs' behalf. *See* Tr. 563-79.

D. Testing and Adding New Questions to the Census

The Census Bureau's longstanding opposition to a citizenship question on the census is consistent with a more general reluctance to tinker with the questionnaire unnecessarily. That is, although early census questionnaires changed regularly, a more sophisticated understanding of statistics and survey design in the modern era has caused the Census Bureau to approach any changes to the questionnaire with great care. For instance, after the 1990 census, the Census Bureau considered adding a question regarding respondents' Social Security Numbers ("SSNs") to the "short-form" questionnaire. *See* Tr. 998-99. Before deciding to add such a question, however, the Census Bureau conducted a randomized controlled trial comparing a version of the questionnaire that asked about SSNs to one that did not in order to assess the question's impact on self-response rates. *See id.* at 999. Overall, the Census Bureau observed a 3.4% decline in self-response rates attributable to the question, a decline that was not evenly distributed among subpopulations. *See id.* at 999-1000. In part due to these results, the Census Bureau did not —and does not to this day—ask a question about SSNs on the decennial census. *See id.* at 999.

As the SSN example reflects, in recent decades, the Census Bureau has followed a fairly robust process in evaluating whether to add a new question to a survey such as the census. AR 9865, 9867; AR 3560; AR 3890-91; Docket No. 516-1 ("Thompson Decl."), ¶¶ 45, 47-49. The process usually begins with a request from Congress or an Executive Branch agency to add a question. AR 3890; *see* AR 2304. After receiving such a request, the Census Bureau works with the Office of

Management and Budget ("OMB") to ensure that the proposed data collection would comply with applicable legal and regulatory requirements. AR 3890. If the Census Bureau determines that adding the new question is "warranted," the Secretary of Commerce notifies Congress of his intent to add the question—first by including the subject of the question in the Section 141(f)(1) report to Congress, at least three years before the census date and, later, by reporting the question itself in the Section 141(f)(2) report, at least two years before the census date. *Id.* The Census Bureau must then test the wording of the new question. AR 3891. Pre-testing requires approval from OMB and a process that includes notifying the public and inviting comment through a notice in the Federal Register. *Id.* After the Census Bureau has responded to comments, OMB can approve the test. *Id.* Once the question has been tested, the Census Bureau must redesign the questionnaires (or internet collection systems), including translation into non-English languages, and redevelop training procedures for enumerators. *Id.* Finally, the Census Bureau must submit the final questionnaire to OMB for approval. *Id.*

This process is subject to several sets of guidelines and standards governing collection of statistical data. First, since 2006, the design and administration of governmental surveys—including the census—have been subject to OMB's *Standards and Guidelines for Statistical Surveys*. PX-260, at ii; *see* 79 Fed. Reg. 71610 (Dec. 2, 2014); PX-359; *see also* Docket No. 498-11 ("Habermann Aff."), ¶ 20. Several provisions of the OMB *Standards and Guidelines* are relevant here. First, Statistical Directive Number 1 requires that "a Federal statistical agency must be independent from

political and other undue external influence in developing, producing, and disseminating statistics." 79 Fed. Reg. at 71612. Second, Standard 2.3 states that "[a]gencies must design and administer their data collection instruments and methods in a manner that achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost." PX-359, at ii. Finally, Guideline 2.3.1 states: "Design the data collection instrument in a manner that minimizes respondent burden, while maximizing data quality." *Id.* at 11.

Additionally, in 2010, the Census Bureau adopted a comprehensive set of "Statistical Quality Standards." PX-260, at vii. The Standards require pre-testing of any questions to be added to data-collection products such as the census questionnaire. *See id.* at 8. Sub-Requirement A2-3.3 of the Standards requires that "[d]ata collection instruments and supporting materials *must* be pretested with respondents to identify problems (e.g., problems related to content, order/context effects, skip instructions, formatting, navigation, and edits) and then refined, prior to implementation, based on the pretesting results." *Id.* at 8 (emphasis added). Sub-Requirements A2-3.3-1c and A2-3.3-1d further provide that pretesting must be performed when "[r]eview by cognitive experts reveals that adding pretested questions to an existing instrument may cause potential context effects" and when "[a]n existing data collection instrument has substantive modifications (e.g., existing questions are revised or new questions added)." *Id.* The Standards note that, "[o]n rare occasions, cost or schedule constraints may make it infeasible to perform complete pretesting. In such cases, subject matter and cognitive experts must discuss the need for and

feasibility of pretesting. The program manager must document any decisions regarding such pretesting, including the reasons for the decision. If no acceptable options for pretesting can be identified, the program manager must apply for a waiver." *Id.* The Standards provide for another exception to the pretesting requirement: "Pretesting is not required for questions that performed adequately in another survey." *Id.*

E. Secretary Ross's Decision and This Litigation

As noted above, the Census Act requires the Secretary of Commerce to submit a report to the relevant congressional committees at least three years before any given census listing the "subjects proposed to be included, and the types of information to be compiled" on the census. 13 U.S.C. § 141(f)(1). Consistent with that requirement, in March 2017—approximately one month after his confirmation by the Senate—Secretary Ross submitted a report to Congress titled "Subjects Planned for the 2020 Census and American Community Survey." *See* AR 194-270. The report listed as the planned subjects for the 2020 census questionnaire the very same subjects that had appeared on the 2010 census questionnaire: age, gender, race/ethnicity, relationship, and tenure (that is, whether the respondent's home in question is owned or rented). *See* AR 204-13. The list of subjects did not include citizenship status.

On March 26, 2018, however, Secretary Ross issued a memorandum directing the Census Bureau to reinstate a question about citizenship status on the 2020 census questionnaire. *See* AR 1313-20 ("Ross Memo"). In his memorandum, Secretary Ross asserted that his decision was prompted by a letter from DOJ, dated December 12, 2017, which requested reinstatement of

the citizenship question to facilitate enforcement of Section 2 of the VRA. *See* Ross Memo 1, at AR 1313. A few days later, Secretary Ross submitted another report to Congress (of which the Court can and does take judicial notice) titled "Questions Planned for the 2020 Census and American Community Survey." *See* PX-489. The report included the following planned question about citizenship:

Id. at 7. It stated that a question about citizenship had been "asked since 1820." *Id.*; *see id.* n.1 ("Citizenship asked 1820, 1830, 1870, and 1890 to present."). And it asserted that the question is "USED TO CREATE STATISTICS ABOUT CITIZEN AND NONCITIZEN POPULATIONS," which "are essential for enforcing the Voting Rights Act" and "is of interest to researchers, advocacy groups, and policymakers." *Id.* (capitalization in original).

Eight days after Secretary Ross's March 26, 2018 memorandum announcing his decision, the first of these cases—brought by a coalition of states and local governmental entities (the "Governmental Plaintiffs")—was filed. *See* Docket No. 1. The Governmental

Plaintiffs are comprised of eighteen states (New York, Colorado, Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington) and the District of Columbia, fifteen cities and counties (the cities of Central Falls, Chicago, Columbus, New York, Philadelphia, Phoenix, Pittsburgh, Providence, and Seattle; the city and county of San Francisco; and the counties of Cameron, El Paso, Hidalgo, and Monterey), and the United States Conference of Mayors. *See* Governmental Plaintiffs' Second Amended Complaint ("SAC"), Docket No. 214. On June 6, 2018, the second case—brought by a coalition of nongovernmental organizations (the "NGO Plaintiffs")—was filed. *See* NGO Plaintiffs' Complaint ("NGO Compl."), 18-CV-5025, Docket No. 1. The NGO Plaintiffs are comprised of New York Immigration Coalition ("NYIC"), CASA de Maryland ("CASA"), American-Arab Anti-Discrimination Committee ("ADC"), ADC Research Institute ("ADCRI"), and Make the Road New York ("MRNY"). *See id.* In each case, Plaintiffs alleged that Secretary Ross's decision to reinstate a citizenship question violated both the APA and the Enumeration Clause of the Constitution. The NGO Plaintiffs argued as well that the decision violated the equal protection component of the Fifth Amendment's Due Process Clause.

The procedural history of these cases has been somewhat unusual because, among other things, Defendants filed multiple petitions for mandamus challenging discovery orders issued by the Court and corresponding applications—to this Court, the Second Circuit, and the Supreme Court—to stay proceedings pending adjudication of those petitions. *See New York v.*

U.S. Dep't of Commerce, No. 18-CV-2921 (JMF), 2018 WL 6060304, at *1 n.1 (S.D.N.Y. Nov. 20, 2018) (detailing this history). For present purposes, two pieces of that procedural history warrant mention. First, in May and June 2018, Defendants moved to dismiss all of Plaintiffs' claims. *See* Docket No. 154; 18-CV-5025, Docket No. 38. On July 26, 2018, the Court granted those motions in part and denied them in part. *See New York*, 315 F. Supp. 3d at 811-12. The Court denied the motions with respect to Plaintiffs' claims under the APA and the Due Process Clause, finding, among other things, that the NGO Plaintiffs had alleged a plausible claim of invidious discrimination in violation of the Fifth Amendment's Due Process Clause. *See id.* at 806-08. By contrast, the Court held that Plaintiffs failed to state a claim under the Enumeration Clause. "That conclusion," the Court reasoned, was "compelled not only by the text of the Clause, which vests Congress with virtually unlimited discretion in conducting the census, but also by historical practice," namely "that, since the very first census in 1790, the federal government has consistently used the decennial exercise not only to obtain a strict headcount . . . , but also to gather demographic data about the population on matters such as race, sex, occupation, and, even citizenship." *Id.* at 774.

Second, around the same time, Plaintiffs moved for relief related to the "Administrative Record"—the record, compiled and submitted by Defendants, of materials "upon which the Secretary of Commerce based his decision." Docket Nos. 173, 173-1; *see* Docket No. 193. To the extent relevant here, Plaintiffs moved for two forms of relief: first, an order compelling Defendants to "complete" the Administrative Record; and second,

an order authorizing discovery "outside" the Administrative Record. *See* Docket No. 193, at 1. In an oral ruling on July 3, 2018, the Court granted both requests. With respect to the former, the Court found that the Administrative Record did not constitute the "whole record"—namely, the "full scope of" materials that Secretary Ross had considered, whether directly, "indirectly," or "constructively." Docket No. 208 ("July 3rd Tr."), at 79-82. And with respect to the latter, the Court found that Plaintiffs had "made a strong preliminary showing or *prima facie* showing that they will find material beyond the Administrative Record indicative of bad faith" or pretext. *Id.* at 85. Notably, Defendants did not immediately challenge the Court's ruling authorizing discovery beyond the Administrative Record (and have never challenged its ruling with respect to completing the Administrative Record). Several months later, however, after the Court authorized depositions of Secretary Ross and a DOJ official, Defendants challenged those rulings by way of petitions for mandamus, tacking on a challenge to the Court's initial discovery Order. Eventually, the Supreme Court agreed to hear one such challenge (treating Defendants' mandamus petition as a petition for certiorari), *In re Dep't of Commerce*, — S. Ct. —, 2018 WL 5458822 (Nov. 16, 2018); and stayed the deposition of Secretary Ross pending its decision, but otherwise allowed these proceedings to continue, *see In re Dep't of Commerce*, 139 S. Ct. 16 (2018) (mem.).[8] The case proceeded to trial, without a jury, on November 5, 2018. After

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[8] The Supreme Court is scheduled to hear oral argument on February 19, 2019. *See In re Dep't of Commerce*, 2018 WL 5458822, at *1.

extensive post-trial briefing (Plaintiffs' briefs, alone, totaled 502 pages), the Court held closing arguments on November 27, 2018.[9]

SECRETARY ROSS'S DECISION

With that as background, the Court turns to the process and basis for Secretary Ross's March 26, 2018 decision. In light of the pending Supreme Court challenge to the Court's decision authorizing extra-record discovery and the limited time to resolve Plaintiffs' claims before the 2020 census questionnaires need to be printed, the Court begins with an account that is based exclusively on the initially filed Administrative Record and then turns to what the evidence beyond that portion of the Administrative Record reveals.[10]

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[9] In addition to the parties' pre- and post-trial briefs, the Court received and considered nine *amicus curiae* briefs. *See* Brief of the American Statistical Association et al. as *Amici Curiae* in Support of Plaintiffs' Position at Trial, Docket No. 420-1; Brief of *Amici Curiae* Former Census Bureau Directors in Support of Plaintiffs' Trial Position, Docket No. 423-1; Brief *Amicus Curiae* of the Public Interest Legal Foundation in Support of Defendants' Position at Trial, Docket No. 426-1; Brief of Common Cause et al. as *Amici Curiae* in Support of Plaintiffs, Docket No. 427-1; Brief of the Electronic Privacy Information Center as *Amicus Curiae* in Support of Plaintiffs' Position at Trial, Docket No. 428-1; Brief of *Amici Curiae* Norman Y. Mineta et al. in Support of Plaintiffs at Trial, Docket No. 435-1; Brief of *Amici Curiae* Tech: NYC et al. in Support of Plaintiffs, Docket No. 439-1; Brief of the Leadership Conference on Civil and Human Rights as *Amicus Curiae*, Docket No. 443-1; Brief of the New York State Black, Puerto Rican, Hispanic and Asian Legislative Caucus, as *Amici Curiae*, in Support of Plaintiffs, Docket No. 449-1.

[10] For ease of reference, the Court summarizes the relevant facts in sequentially numbered paragraphs, cited throughout this

A. The Initial Administrative Record Submission

1. Defendants first filed what they characterized as the Administrative Record on June 8, 2018. *See* Docket No. 173. That submission was 1,320 pages and included the December 12, 2017 DOJ letter requesting addition of a citizenship question to the census questionnaire; various analyses of that request by the Census Bureau; and Secretary Ross's March 26, 2018 memorandum. These pages reveal that the Census Bureau repeatedly and consistently recommended against addition of a citizenship question to the census questionnaire based on its assessment that adding the question would reduce self-response rates, thereby increasing costs and harming the overall data and integrity of the census, *and* that DOJ's stated interest in having more granular citizenship data could be satisfied in a less costly, more effective, and less harmful manner. More importantly, for the purposes of this Court's review, the initial Administrative Record submission alone contains overwhelming evidence to that effect, and none that contradicts it.

1. The December 12, 2017 DOJ Letter

2. Secretary Ross asserted in his March 26, 2018 memorandum that his decision to add the citizenship question to the census questionnaire was prompted by a December 12, 2017 letter from DOJ. The letter came from Arthur E. Gary of the Justice Management Division; it was addressed to then-Acting Director Jarmin. *See* AR 663-65 (the "Gary Letter"); AR 1525-27

Opinion as "Recitation of Facts ¶ [Number]." As noted below, a separately demarcated range of those paragraphs constitute the Court's findings of fact with respect to the issue of standing.

(same). In the letter, DOJ "formally request[ed] that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship, formerly included on the so-called 'long form' census." Gary Letter 1, at AR 663. "This data," the Letter stated, "is critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting. To fully enforce those requirements, the Department needs a reliable calculation of the citizen voting-age population in localities where voting rights violations are alleged or suspected." *Id.*

3. More specifically, the Gary Letter noted that the Supreme Court had "held that Section 2 of the Voting Rights Act prohibits 'vote dilution' by state and local jurisdictions engaged in redistricting, which can occur when a racial group is improperly deprived of a single-member district in which it could form a majority." Gary Letter 1, at AR 663 (citing *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986)). Further, "[m]ultiple federal courts of appeals have held that, where citizenship rates are at issue in a vote-dilution case, citizen voting-age population"—often referred to as "CVAP"—"is the proper metric for determining whether a racial group could constitute a majority in a single-member district." *Id.* (citing cases). "These cases," the Gary Letter reasoned, "make clear that, in order to assess and enforce compliance with Section 2's protection against discrimination in voting, the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected." Gary Letter 2, at AR 664.

4. The Gary Letter noted that DOJ had previously relied on citizenship data acquired through either the "long form" census questionnaire or the ACS. *See id.* The Gary Letter asserted, however, that citizenship data acquired through the ACS is not "ideal . . . for such purposes" for four reasons. Gary Letter at 2-3, at AR 664-65. First, "[j]urisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census to determine compliance with the Constitution's one-person, one-vote requirement," such that "using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly." *Id.* at 2, at AR 664. Second, ACS surveys are conducted annually and produce data that are "aggregated into one-year, three-year, and five-year estimates," and thus "do not align in time with the decennial census data," whereas "[c]itizenship data from the decennial census . . . would align in time with the . . . data from the census that jurisdictions already use in redistricting." *Id.* at 3, at AR 665. Third, "ACS estimates are reported at a ninety percent confidence level" (that is, as a statistical sample with a margin of error that "increases as the sample size—and thus, the geographic area—decreases"), whereas "decennial census data is a full count of the population." *Id.* And finally, decennial "Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group," requiring DOJ in some instances to "perform further estimates" of CVAP at the census block level. *Id.*

5. "For all of these reasons," the Gary Letter concluded, DOJ "believes that decennial census questionnaire data regarding citizenship, if available, would be

more appropriate for use in redistricting and in Section 2 litigation than the ACS citizenship estimates." *Id.* On that basis, the Gary Letter "formally request[ed]" that the Census Bureau "reinstate" a citizenship question on the 2020 census. *Id.* "At the same time," however, the Gary Letter "request[ed] that the [Census] Bureau also maintain the citizenship question on the ACS, since such question is necessary, *inter alia*, to yield information for the periodic determinations made by the Bureau under Section 203 of the Voting Rights Act." *Id.*[11]

2. The Census Bureau's Preliminary Analyses and Recommendations

6. Following receipt of the Gary Letter, experts at the Census Bureau—acting under the supervision of Dr. John M. Abowd, the Bureau's Chief Scientist and Associate Director for Research and Methodology—sought to determine the effects of adding a citizenship question to the census questionnaire and whether there were alternative means to satisfy DOJ's interest in more granular citizenship data. The Census Bureau's initial analyses and recommendations were memorialized in memoranda dated December 22, 2017, *see* AR 11634-45 (the "December 22 Memo"); *see also* AR 5500-11 (copy of the same); January 3, 2018, *see* AR 5473-75 (the "January 3 Memo");[12] and January 19, 2018, *see* AR 1277-85 (the "January 19 Memo").[13]

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[11] Section 203 of the VRA requires that the Census Bureau use the ACS to acquire data, including citizenship data, related to language-minorities who might be adversely affected by state voting systems. *See* 52 U.S.C. § 10503(b)(2)(A).

[12] Neither the December 22, 2017 Memo nor the January 3, 2019 Memo appeared in Defendants' initial Administrative Record sub-

7. The December 22 Memo included two significant conclusions. First, the Memo opined that the Census Bureau could "potentially" obtain "a more accurate measure of citizenship" in a more "cost efficient" manner by using means other than a question on the census. December 22 Memo, at AR 11644. The Memo identified four existing surveys, including the ACS, through which the Census Bureau obtained "directly reported" citizenship data, as well as a slew of "administrative record[s]" (that is, records from other federal agencies or states) with similar information that the Census Bureau had or could acquire. *Id.* at AR 11634-35. The administrative records included Numident, a Social Security Administration ("SSA") dataset that represents "the most complete and reliable administrative record source of citizenship data currently available," and citizenship data maintained by the U.S. Customs and Immigration Service ("USCIS"). *Id.* at AR 11636, 11643-44.

8. Second, the December 22 Memo concluded that including a citizenship question in the 2020 census questionnaire was likely to depress self-response rates, particularly among noncitizen households; increase costs;

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mission, *see* AR 1-1320, but it is undisputed that both are properly part of the Administrative Record, *see* Docket No. 523, at Joint Stip. ¶ 63, and given their close relation to the evidence and analyses reflected in the subsequent Memos, the Court discusses them where they fit best both logically and chronologically.

[19] Defendants submitted a copy of the January 19 Memo in their initial Administrative Record submission with a watermark reading "DRAFT Pre-decisional (V2.6)." AR 1277-1285. The January 19 Memo appears elsewhere in the complete Administrative Record in substantially identical form, but without that watermark. *See* AR 12480-88; 12493-12501.

and produce lower quality citizenship data. *Id.* at AR 11639-45. The Memo explained that including a citizenship question could lower the rate of voluntary compliance, which would require expanded field operations that "require additional unnecessary costs and burden to the Bureau." *Id.* at AR 11644-45.

9. The December 22 Memo recommended that the best way to "support[] redistricting in the manner requested by the Department of Justice is" not to add a citizenship question to the census, but "to make a citizenship variable available on the 2020 Census Edited File (CEF)." *Id.* at AR 11644. The CEF is "the internal, confidential data file" that underlies the census data set used by DOJ in redistricting, known as the "PL94 tabulations." *Id.* If citizenship were available on the CEF, the Memo explained, the PL94 tabulations could be restructured to include direct estimates of CVAP by race and ethnicity at the census block level. *See id.* "These tabulations would have essentially the same accuracy as current PL94 and Summary File 1 (SF1) data." *Id.*

10. On the afternoon of December 22, 2017, Dr. Jarmin emailed Arthur Gary at DOJ, stating that "the best way to provide PL94 block-level data with citizen voting population by race and ethnicity would be through utilizing a linked file of administrative and survey data the Census Bureau already possesses. This would result in higher quality data produced at lower cost." AR 3289.

11. The January 3 Memo from Dr. Abowd to Dr. Jarmin expanded on the December 22 Memo's analyses and recommendations. *See* January 3 Memo, at AR

5473-75. The January 3 Memo described "three alternatives for meeting the DoJ request." *Id.* at AR 5473.

12. Under Alternative A, the Census Bureau would "[m]aintain the status quo for data collection, preparation, and publication," but would prepare a "special product" for DOJ containing the Census Bureau's "best estimate of block-level citizen voting age population by race and ethnicity," similar to what the Census Bureau prepares for use in connection with Section 203 of the VRA. *Id.* Alternative A would cost an extra $200,000 and would produce similar-quality data to that produced for Section 203 purposes. *Id.* at AR 5474.

13. The January 3 Memo concluded that Alternative B—adding a citizenship question to the 2020 census questionnaire—would "most likely deliver higher quality block-level citizen voting age population by race and ethnicity data than Alternative A." *Id.* But it would cost an estimated additional $27.5 million and, based on an estimated minimum 5.1% decline in self-response among noncitizen households, would lead to an estimated minimum "154,000 *fewer* correct enumerations." *Id.*[14]

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[14] As discussed below in connection with the issue of standing (as to which the Court may review evidence outside the Administrative Record), the Census Bureau has since revised its conservative estimates of both the increased costs and the decline in self-response rates attributable to the citizenship question. The Census Bureau currently estimates that adding the question will increase the costs of the census by at least $82.5 million and that it will cause a differential decline in the self-response rate among noncitizen households of at least 5.8%. *See* Recitation of Facts ¶ 160.

14. Finally, the January 3 Memo addressed Alternative C, the option the December 22 Memo had recommended (although not by that name). *See* December 22 Memo, at AR 11644. Under Alternative C, the Census Bureau would not add a citizenship question to the questionnaire, but would "[a]dd the capability to link an accurate, edited citizenship variable from administrative records to the final 2020 Census microdata files." January 3 Memo, at AR 5473. In that way, Alternative C would provide block-level tabulations of CVAP by race and ethnicity. *Id.* It would deliver "higher quality data than Alternative B for DoJ's stated uses" because the "primary data sources for the administrative record citizen variable require proof of citizenship" and, thus, are "very accurate." *Id.* at AR 5475.

15. Based on this analysis, the January 3 Memo opined that "Alternative A is not very costly and does not harm the quality of the census count"; that "Alternative B better addresses DoJ's stated uses," but "is very costly and does harm the quality of the census count"; and that "Alternative C even better meets DoJ's stated uses, is comparatively far less costly than Alternative B, and does not harm the quality of the census count." *Id.* "For these reasons," the Memo concluded, "we recommend Alternative C for meeting the Department of Justice data request." *Id.*

16. The January 19 Memo contained a "Technical Review" of the facts and the Census Bureau's analysis of Alternatives A, B, and C. January 19 Memo, at AR 1277-85.

17. The January 19 Memo described Alternative A in more detail, explaining that existing "redistricting and CVAP data are used by the Department of Justice

to enforce the Voting Rights Act" and "by state redistricting offices to draw congressional and legislative districts that conform to constitutional equal-population and Voting Rights Act nondiscrimination requirements. Because the block-group-level CVAP tables have associated margins of error, their use in combination with the much more precise block-level census counts in the redistricting data requires sophisticated modeling. For these purposes, most analysts and the DoJ use statistical modeling methods to produce the block-level eligible voter data that become one of the inputs to their processes." *Id.* at AR 1279. Without modifying any of its other procedures, the January 19 Memo explained, the Census Bureau could deploy "a small team of Census Bureau experts similar in size and capabilities to the teams used to provide the Voting Rights Act Section 203 language determinations" to assist DOJ in making those calculations. *Id.* The January 19 Memo updated the cost of Alternative A to $350,000, and estimated that it would "have no impact on the quality of the 2020 Census." *Id.*

18. The January 19 Memo also presented an updated analysis of Alternative B. *Id.* at AR 1279-82. It explained bluntly that adding a citizenship question to the census "is very costly, harms the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources." *Id.* at AR 1277. The Memo summarized "[t]hree distinct analyses" showing that the addition of a citizenship question would lead to "an adverse impact on self-response" to the census questionnaire and, consequently, "on the accuracy and quality of the 2020 Census." *Id.* at AR 1280. First, the Memo described evidence that a citizenship question would

increase "item nonresponse rates"—that is, omitted answers to the question—and would do so disproportionately among Hispanics. *Id.* Second, the Memo described evidence that a citizenship question would decrease "self-response rates"—that is, the rate at which households voluntarily respond to the questionnaire—and would do so disproportionately among noncitizen households. *Id.* at AR 1280-81. Third, the Memo described evidence that a citizenship question would increase "breakoff rates"—that is, the rate at which households stop answering the questionnaire when they come to a particular question—and would do so disproportionately among Hispanics. *Id.* at AR 1281.

19. The updated analysis of Alternative B included more detail on its high cost. *Id.* at AR 1281-82. The reduction in self-response rates caused by the citizenship question, the January 19 Memo explained, would lead to more people being counted through the Census Bureau's NRFU (that is, Non-Response Follow-Up) procedures. *Id.* at AR 1280. The greater use of NRFU procedures produces, in turn, lower-quality data because the NRFU procedures yield more "erroneous enumerations" and "whole-person imputations" than self-responses do. *Id.* at AR 1281.[15] Using the "conservative" estimate that addition of a citizenship question

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[15] An "erroneous enumeration" is the counting of a person who "should not have been counted for any of several reasons, such as, that the person is (1) a duplicate of a correct enumeration; (2) is inappropriate (e.g., the person died before Census Day); or (3) is enumerated in the wrong location for the relevant tabulation." AR 1281. A "whole-person census imputation is a census microdata record for a person for which all characteristics are imputed." *Id.*

would cause a 5.1% decline in self-response among noncitizen households, the January 19 Memo explained that adding a citizenship question would produce 432,000 fewer correct enumerations and would cost at least $27.5 million more. *Id.* at AR 1282. The Memo stressed that its estimates of the decline in data quality and increase in cost associated with Alternative C were "conservative" and that the true numbers could be "much greater." *Id.*

20. The January 19 Memo also discussed Alternative C in more depth. It summarized the Census Bureau's evidence that Alternative C—linking a citizenship variable from administrative records to the census microdata files—"is comparatively far less costly than Alternative B, does not increase response burden, and does not harm the quality of the census count." AR 1277. The Memo noted that the Census Bureau had been testing its ability to link administrative data to census data in that manner since the 1990 census. *Id.* For the 2020 census, the Census Bureau had already begun "regularly ingesting and loading administrative data from the Social Security Administration, Internal Revenue Service and other federal and state sources into the 2020 Census data systems." *Id.*

21. Significantly, in its analysis of Alternative C, the January 19 Memo again noted that Alternative C was likely to yield more accurate citizenship data than Alternative B would yield. *See id.* at AR 1277. First, the Memo explained that comparisons of ACS data and federal administrative records revealed that somewhere between 23.8% and 30% of people whom administrative records indicate are noncitizens report that they are citizens on the ACS. *See id.* at AR 1283.

This suggests that self-reported citizenship status is of dubious accuracy. Second, the sampling techniques used for ACS data may not accurately predict the citizenship status of those who do not respond. The sampling techniques assume that those who do not respond to any given question are statistically similar to those who do—an assumption contradicted by the data. *See id.* at AR 1283-84. As a result, the ACS imputes citizenship responses based on data that is not predictive of the missing set. *See id.*

22. The January 19 Memo acknowledged that the Numident database might be missing citizenship data for older citizens who obtained SSNs before the SSA required proof of citizenship, for naturalized citizens who have not communicated the fact of their naturalization to the SSA, and for noncitizens who do not have a SSN or other taxpayer identification number. *Id.* at AR 1285. "All three of these shortcomings," however, "are addressed by adding data from [USCIS]." *Id.* Accordingly, the Memo concluded, "the administrative records citizenship data would most likely have both more accurate citizen status *and* fewer missing individuals than would be the case for any survey-based collection method." *Id.* (emphasis added). The January 19 Memo estimated that the cost of using administrative records to obtain block-level CVAP data would be between $500,000 and $2 million. *Id.*

3. Secretary Ross's February 12, 2018 Meeting with the Census Bureau

23. On February 12, 2018, Secretary Ross met with Dr. Abowd and others from the Census Bureau to discuss the various alternatives. *See* AR 9450. The Administrative Record contains only one document con-

cerning what was discussed at the meeting: an email dated February 13, 2018, from an attendee at the meeting, "identif[ying]" action items and items for future consideration that were discussed at the meeting. AR 9450. The Administrative Record otherwise contains no record—contemporaneous or otherwise—of what was discussed during the meeting. Nor is there is any indication in the Administrative Record of any other meeting between Secretary Ross and Census Bureau officials.

24. The Administrative Record does reveal that sometime before March 1, 2018, Secretary Ross asked the Census Bureau to analyze a fourth option—"Alternative D"—that would combine Alternative B (adding a citizenship question to the 2020 census) and Alternative C (relying on administrative records to generate block-level CVAP data). *See* AR 1308-12 ("March 1 Memo"), at AR 1309.

4. The Census Bureau's Analysis of Alternative D

25. Dr. Abowd transmitted a detailed analysis of Alternative D to Secretary Ross in a memorandum dated March 1, 2018. The March 1 Memo explained at length that Alternative D (combining the addition of a citizenship question to the census with the use of administrative records) would entail "all the negative cost and quality implications of Alternative B" (that is, simply adding the citizenship question) and would still produce "poorer quality citizenship data than Alternative C" (that is, linking data from administrative records to data from the census). *See* March 1 Memo at AR 1312.

26. The March 1 Memo described, first, how the various sources of administrative records interact to supplement and correct for one another's "gaps." *See id.* at AR 1309-10. It then identified seven "[r]emaining citizenship data gaps" in the administrative records: (1) "U.S. citizens from birth with no SSN or U.S. passport"; (2) U.S. citizens from birth born outside the United States without a passport who applied for an SSN before they were required to provide proof of their citizenship to do so; (3) U.S. citizens naturalized before 2001 who did not inform the SSA of their naturalization; (4) U.S. citizens who were automatically naturalized if they were under eighteen when their parents were naturalized after 1999, but did not inform USCIS or receive a U.S. passport; (5) lawful permanent residents ("LPRs") who obtained that status before 2001, but lack an SSN or received an SSN before the SSA asked about citizenship; (6) noncitizen, non-LPR residents who do not have an SSN (or other taxpayer identification number) and who have not applied for a visa extension; and (7) persons for whom citizenship does appear in administrative records, but for whom it is not possible to link those records with decennial census data. *Id.* at AR 1310-11.

27. The March 1 Memo explained that, perhaps counterintuitively, "survey data" (that is, data from a citizenship question) would not "help fill the . . . gaps" in the administrative records. *Id.* at AR 1311. This is because a "significant, but unknown, fraction" of people whose citizenship status is unknown fall into "Category Six": noncitizen, non-LPR residents without SSNs or taxpayer IDs. These people have a "strong incentive to provide an incorrect answer" or no answer to a citizenship question. *Id.* And, because "there is no

feasible method of independently verifying their non-citizen status," identifying false reports of citizenship on the census would be "an inexact science." *Id.* Instead of doing that inexact science, the "survey response[s] of 'citizen' would be accepted as valid" for large numbers of people who are not, in fact, citizens. *See id.* Making matters worse, if a household does not self-respond in order to protect one household member in Category Six, this problem would apply to the entire household. *See id.* at AR 1311-12.

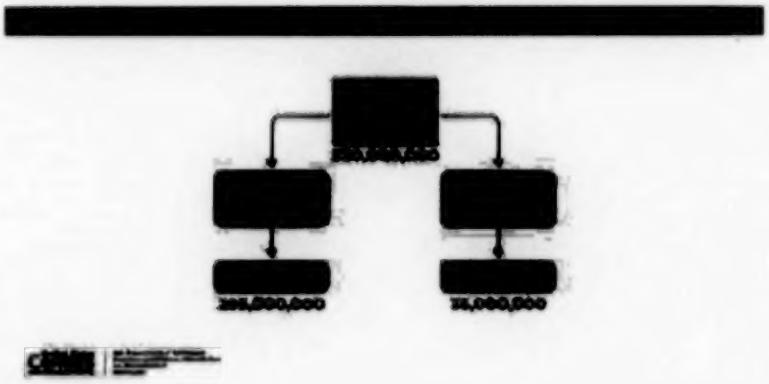
28. Second, the March 1 Memo explained that, like Alternative B, Alternative D would lower self-response rates and "push[] more households into . . . NRFU." *Id.* at AR 1311. That would lower the quality of the data in two ways. First, as explained above, NRFU procedures yield more "erroneous enumerations" and "whole-person imputations" than self-responses do. January 19 Memo, at AR 1281. Second, NRFU procedures produce more responses that cannot be linked to administrative records (due to lower-quality personal identifying information) and linking to administrative records helps improve the accuracy of the survey data. *See* March 1 Memo, at AR 1311. For responses gathered through NRFU procedures, only 81.6% can be linked to people recorded in administrative records, compared to 96.7% for self-responses in the 2010 census. *Id.*

29. Additionally, the March 1 Memo concluded that Alternative D would likely increase the number of proxy responses required, another less accurate type of enumeration. *See id.* This is because those who do not self-respond because of the presence of the citizenship question are especially likely not to respond in

NRFU as well. *See id.* Proxy responses also lead to even lower rates of linkage to administrative data on citizenship: only 33.8%. *See id.*

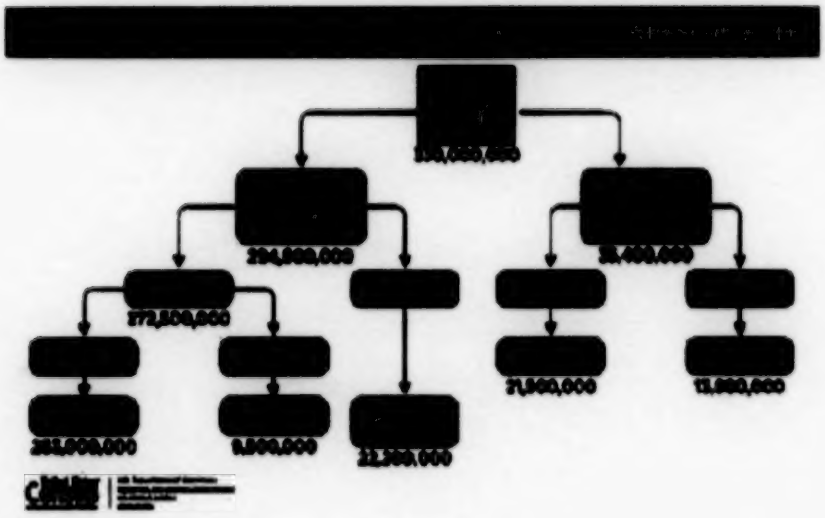
30. The March 1 Memo concluded that Alternative D was plainly inferior to Alternative D: It "would result in poorer quality citizenship data than Alternative C," *and* it "would still have all the negative cost and quality implications of Alternative B" summarized in the January 19 Memo. *Id.* at AR 1312. The March 1 Memo remarked that "[u]sing the 2020 Census data only to fill in gaps for persons without administrative data on citizenship would raise questions about why 100 percent of respondents are being burdened by a citizenship question to obtain information for the two percent of respondents where it is missing." *Id.*

31. In another memorandum, undated but obviously written in this same March 2018 timeframe, Dr. Abowd presented Secretary Ross with numerical estimates illustrating the differences between Alternative C and Alternative D. *See* AR 1304-06 ("Key Differences Memo"). The Key Differences Memo illustrated that, under Alternative C, the Census Bureau expected to link 295 million people—89.4% of the population—to high-quality citizenship data. *Id.* at AR 1306. It would be unable to identify the citizenship status of 35 million people through linking, leaving those to be modeled. *Id.* The Key Differences Memo illustrated these numbers for Alternative C in the following flowchart:



AR 1306.

32. The Key Difference Memo explained that, under Alternative D, the Census Bureau expected to receive responses to the citizenship question from 294.6 million people. *See id.* at AR 1307. Of those responses, 263 million could be confirmed through linkages to administrative records; 9.5 million responses could be linked to, *but would be inconsistent with*, citizenship data in administrative records; and 22.2 million responses would not be linked to administrative records at all. *See id.* On top of that, the Census Bureau expected that approximately 35.4 million people's citizenship would not be measured by the 2020 census, either due to nonresponse or NRFU failure. *See id.* Approximately 21.5 million non-respondents could be linked to administrative records containing citizenship data, while approximately 13.8 million would have to have their citizenship status modeled. *See id.* Once again, the Key Differences Memo illustrated the numbers for Alternative D with a flowchart:



AR 1307.

33. These numbers reveal that Alternative D would produce *more* people who could not be linked to administrative records: 36 million people in Alternative D as compared to 35 million in Alternative C. *See id.* at AR 1306-07. Of the unlinked people in Alternative D, 13.8 million would have their citizenship modeled (or "imputed"), *see id.* at AR 1307, while 22.2 million would have their citizenship status evaluated through their census responses, despite the known likelihood that a high rate of noncitizens (just under 500,000, according to the Census Bureau's estimate) would be incorrectly enumerated as citizens through the survey process. *See id.* at AR 1305-07; March 1 Memo, at AR 1311. That would leave 9.5 million people whose census responses would conflict with administrative records. *See* Key Differences Memo, at AR 1307. For these people, the "[h]istoric Census Bureau practice is to use self-

reported data in these situations," even though "the Census Bureau now knows from linking ACS responses on citizenship to administrative data that nearly one third of noncitizens in the administrative data respond to the questionnaire indicating they are citizens, indicating that this practice should be revisited in the case of measuring citizenship." *Id.* at AR 1305.

34. Put differently, Alternative D would provide no improvement to the citizenship data available under Alternative C for 90.4% of the population. For 6.7% of the population, Alternative D would produce *lower* quality data than Alternative C because the Census Bureau would have to use survey responses that are, generally speaking, less accurate than the imputation methods the Census Bureau would deploy under Alternative C. *See id.* And finally, for 2.9% of the population, Alternative D would create a problem that would not exist under Alternative C: conflicts between the survey data and the administrative data, with no reliable method for discerning accurate data amidst the conflict. *See id.*

35. The Key Differences Memo summarized the implications of these comparative predictions. He acknowledged that "all possible measurement methods will have errors" and that the Census Bureau "cannot quantify the relative magnitude of the errors across the alternatives at this time." *Id.* at AR 1305. Nevertheless, Alternative C would involve some risk of error in the administrative record data, but that would be "relatively limited" thanks to the procedures used by the SSA, USCIS, and the State Department. *Id.* Alternative C would also be subject to some prediction error in the 35 million cases that would have to be modeled, which would be a similar, but lesser issue in

Alternative D. *Id.* By contrast, Alternative D would be subject to an error that is "only an issue in Alternative D": the "response error." *Id.* Dr. Abowd noted that while "[s]tatisticians often hope" that such response errors "are random and cancel out," the Census Bureau "know[s] from prior research" that they are "systematically biased for a subset of noncitizens." *Id.*

5. Communications with Stakeholders

36. While the Census Bureau was analyzing the citizenship question, the Commerce Department was communicating with stakeholders about the question. At the February 12, 2018 meeting with Dr. Abowd and other representatives of the Census Bureau, Secretary Ross requested a list of stakeholders with whom to discuss the addition of the citizenship question to the census. *See* AR 9450. During the outreach to stakeholders after the meeting, however, Commerce Department officials struggled to find anyone willing to express support for adding the question. *See* AR 3274-75 ("Email re AEI"); AR 4853-55 (same).

37. For example, on February 13, 2018—only one day after the meeting with Secretary Ross—Dr. Jarmin emailed someone at the American Enterprise Institute ("AEI"): "We are trying to set up some meetings for Secretary Ross to discuss the proposed citizenship question on the 2020 Census with interested stakeholders. *Most stakeholders will speak against the proposal. We're looking to find someone thoughtful who can speak to the pros of adding such a question.*" Email re AEI, at AR 3275 (emphasis added). Later the same day, Michael Strain of the AEI responded: "None of my colleagues at AEI would speak favorably about the

proposal. Is it important that the person actually be in favor of the proposal?" *Id.*

38. Dr. Jarmin responded the same day, noting: "We are trying to find someone who can give a professional expression of support for the proposal in contrast to the many folks we can find to give professional statements against the proposal. Interesting, but perhaps not so surprising, that no one at AEI is willing to do that." AR 8325. Less than two minutes later, Dr. Jarmin forwarded his email exchange with the AEI to then-Under Secretary for Economic Affairs, Karen Dunn Kelley, noting: "Appears no one at AEI willing to speak in favor of putting question on the 2020." *Id.* at AR 3274.[16] The Administrative Record reflects that only two organizations supported the citizenship question: the Center for Immigration Studies and the Heritage Foundation. *See* AR 1206; AR 8325.

39. By contrast, between December 12, 2017 (the date of the Gary Letter) and March 26, 2018 (the date of Secretary Ross's decision), the Commerce Department received many communications opposing addition of a citizenship question to the census, from former directors of the Census Bureau, business groups, civil rights groups, social science groups, members of Congress, and state and local officials. *See generally* Plaintiffs' Joint Proposed Post-Trial Findings of Fact, Docket No. 545 ("Pls.' Proposed Findings"), ¶¶ 674-724.

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[16] From August 3, 2017, through the date of trial, Kelley served as Under Secretary for Economic Affairs, overseeing the Census Bureau. On November 28, 2018, Kelley was confirmed as Deputy Secretary of Commerce. *See* 164 CONG. REC. S7147, S7195 (2018).

40. For instance, on January 5, 2018, the American Sociological Association ("ASA") wrote to Secretary Ross to urge him to reject DOJ's proposal to add a citizenship question. *See* AR 787. The ASA letter predicted that if a citizenship question were added, "the integrity of the 2020 Census data will be fundamentally compromised." *Id.* "Including a citizenship question," the ASA continued, "is likely to keep some people from responding to the questionnaire and others from responding truthfully, thereby undermining the accuracy of the data. In addition . . . , [w]ith little time left before the 2020 launch, a new question could not be subject to standard rigorous testing, which would further undermine the quality of the data." *Id.*

41. Similarly, on January 9, 2018, members of the Census Scientific Advisory Committee ("CSAC") wrote to then-Attorney General Jeff Sessions, Secretary Ross, and others, calling inclusion of a citizenship question "a serious mistake which would result in a substantial lowering of the response rate." AR 794. The CSAC members noted that "[a]dding a citizenship question to the main Census questionnaire is almost certain to jeopardize the cooperation of at least some community partners and lead to a lower response rate, hurting the reputation of the Census Bureau." *Id.* at AR 794-95.

42. On January 10, 2018, the Leadership Conference on Civil and Human Rights (the "Leadership Conference") wrote to "urge" Secretary Ross "to reject the Department of Justice's untimely and unnecessary request for a new citizenship question on the 2020 Census, which would threaten a fair and accurate decennial census." AR 798. Adding a citizenship question "would destroy any chance for an accurate count,

discard years of careful research, and increase costs significantly." *Id.* Moreover, the Leadership Conference continued, adding a citizenship question was "unnecessary." *Id.* at AR 799. "The Justice Department has never needed to add this new question to the decennial census to enforce the Voting Rights Act before, so there is no reason it would need to do so now." *Id.*

43. On January 26, 2018, Secretary Ross received a letter from six former Directors of the Census Bureau —John Thompson, Robert Groves, Steven Murdock, Kenneth Prewitt, Martha Farnsworth Riche, and Vincent Barabba—expressing concern about the possible addition of a citizenship question. *See* AR 8555-56. The former Directors said they were "troubled to learn that the Department of Justice has recently asked the Bureau to add a new question on citizenship to the 2020 census." *Id.* at AR 8555. They were "deeply concerned about the consequence of this possible action and hope[d] that [their] objective observations provide a useful perspective before a final decision is made on this issue." *Id.*

44. In particular, the former Directors expressed concern that the question had not been appropriately tested. They noted that "[t]here is a great deal of evidence that even small changes in survey question order, wording, and instructions can have significant, and often unexpected, consequences for the rate, quality, and truthfulness of response." *Id.* at AR 8556. That is why "[t]here is a well-proven multi-year process to suggest and test new questions." *Id.* at AR 8555. They wrote that they "strongly believe[d] that adding an untested question on citizenship status at this late point in the decennial planning process would

put the accuracy of the enumeration and success of the census in all communities at grave risk." *Id.*

45. On March 19, 2018, Secretary Ross received a letter from the Latino Community Foundation, which "strongly urge[d Secretary Ross] to reject the inclusion of a citizenship question to the 2020 Census." AR 1222. The Foundation explained: "Including a citizenship question to the census will add to an extensive list of concerns that can and will suppress Latino participation. Increased immigration enforcement, anti-immigrant rhetoric in our political discourse, and privacy concerns have already meshed together to create a climate of fear and aversion of the federal government." *Id.*

46. On March 22, 2018, Secretary Ross received a letter from Ready Nation, a council of "American business leaders," who wrote "to express [its] deep concern about the Department of Justice's request that the Census Bureau include an untested question about citizenship in the 2020 Census questionnaire." AR 3608. The business leaders were concerned because "[t]he decennial Census provides critical data that informs decisionmaking in both the private and public sectors"; they expressed the worry that "[a]dding a new question this late in the decennial Census process could reduce the accuracy" of the census. *Id.*

47. On March 23, 2018, Secretary Ross received a letter from members of the scientific community, including the Acting President of the Federation of American Scientists, the Director of 2020 Census Counts, and the President of the American Political Science Association. *See* AR 1269-71. The letter stated that the DOJ request "is ill-conceived for a number of reasons. We have more accurate methods for measuring and

studying non-citizenship, for example through anonymous surveys. Imposing a citizenship question would lead to a lower participation rate and substantial undercount of certain geographic regions and demographic populations, undermining the scientific integrity of the entire project." *Id.* at AR 1269.

48. That same day, Secretary Ross spoke with Christine Pierce, Senior Vice President of Data Science for Nielsen, a private survey company. *See* AR 1276. According to the Commerce Department notes of the conversation, Pierce expressed concern that the addition of the citizenship question "could lead to a lower response rate," which "is very important." *Id.* Pierce said that "including a question on citizenship could make people less likely to respond, but that there is no data to predict how much lower the response rate might be." *Id.* Pierce explained that at Nielsen, when the company was considering asking a sensitive question that was expected to depress response rates, the company "conducts a cost-benefit analysis to determine whether it is worth asking the question." *Id.* She "noted the importance of testing questions." *Id.* With regard to the federal government's questions, Pierce described that Nielsen once added the ACS questions about birthplace and date of arrival in the United States to one of its surveys. *Id.* She explained that although the company was "concerned about response rates declining, . . . Nielsen did not observe lower response rates to the survey." *Id.* But, Pierce noted, Nielsen would have offered a cash reward to incentivize participation in that survey. *See id.*

6. Secretary Ross's March 26, 2018 Memorandum

49. As noted, on March 26, 2018, Secretary Ross issued his memorandum announcing the decision to adopt Alternative D (which he referred as "Option D"), which included adding the citizenship question to the 2020 census. *See* Ross Memo 1, 4, at AR 1313, 1316. Secretary Ross wrote that "[f]ollowing receipt" of the Gary Letter on December 12, 2017, he had "set out to take a hard look at the request and ensure that [he] considered all facts and data relevant to the question so that [he] could make an informed decision on how to respond." *Id.* at AR 1313. "To that end," he wrote, the Department of Commerce "immediately initiated a comprehensive review process led by the Census Bureau." *Id.*

50. Secretary Ross said that his decision "prioritized the goal of obtaining *complete and accurate data*." *Id.* (emphasis in original). He wrote that "Congress has delegated to me the authority to determine which questions should be asked on the decennial census, and I may exercise my discretion to reinstate the citizenship question on the 2020 decennial census, especially based on DOJ's request for improved CVAP data to enforce the VRA." *Id.* at AR 1314. Secretary Ross did not cite any authority for the proposition that the DOJ's request expanded his discretion to determine the content of the decennial census questionnaire. *See id.* Nor did Secretary Ross address whether he was required to comply with DOJ's request in the first place. *See id.*

51. Secretary Ross noted that "collection of citizenship data by the Census [Bureau] has been a long-standing practice." *Id.* He gave as examples of this "long-standing practice" the fact that a citizenship ques-

tion had appeared on decennial censuses up until 1950; that the 2000 "long form" survey "distributed to one in six people in the U.S.[] included a question on citizenship"; and that the ACS (which replaced the "long form sample") had "included a citizenship question since 2005." *Id.* (internal quotation marks omitted). From this, he concluded that "the citizenship question has been well tested." *Id.* Secretary Ross did not, however, detail any such testing or address how the testing would apply to a question in 2020 on a census questionnaire distributed to the entire population.

52. Secretary Ross explained that DOJ had stated "that the current data collected under the ACS are insufficient in scope, detail, and certainty to meet its purpose under the VRA." *Id.* For that reason, DOJ sought "CVAP data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected." *Id.* Secretary Ross explained that the "Census Bureau ha[d] advised [him] that the census-block-level citizenship data requested by DOJ are not available using the annual ACS, which . . . does ask a citizenship question and is the present method used to provide DOJ and the courts with data used to enforce Section 2 of the VRA." *Id.*

53. Secretary Ross then discussed the four alternatives he had considered in reaching his decision: Alternatives A, B, C, and D (albeit referring to them as "Options" A, B, C, and D). *Id.* at AR 1314-17.

54. The Ross Memo described Alternative A as rejecting the DOJ request entirely and relying entirely on existing citizenship data. *See id.* at AR 1314; January 19 Memo, at AR 1279. Secretary Ross rejected

this option because, "[u]nder Option A, the 2020 decennial census would not include the question on citizenship that DOJ requested and therefore would not provide DOJ with improved CVAP data." Ross Memo 2, at AR 1314. The existing block-level CVAP data obtained through the ACS, he noted, "has associated margins of error because the ACS is extrapolated based on sample surveys." *Id.* Thus, Secretary Ross reasoned, "[p]roviding more precise block-level data would require sophisticated statistical modeling," requiring "the Census Bureau . . . to deploy a team of experts to develop model-based methods that attempt to better facilitate DOJ's request for more specific data." *Id.* Secretary Ross's problem with this option was that "the Census Bureau did not assert and could not confirm that such data modeling is possible for census-block-level data with a sufficient degree of accuracy," and, "[r]egardless, DOJ's request is based at least in part on the fact that existing ACS citizenship data-sets lack specificity and completeness," such that "[a]ny future modeling from these incomplete data would only compound that problem." *Id.* at AR 1314-15. In summary, Secretary Ross wrote that he rejected Alternative A because it "would provide no improved citizenship count, as the existing ACS sampling would still fail to obtain *actual*, complete number counts, especially for certain lower population areas or voting districts, and there is no guarantee that data could be improved using small-area modeling methods." *Id.* at AR 1315.

55. Secretary Ross then turned to Alternative B, "which would add a citizenship question to the decennial census." *Id.* Secretary Ross acknowledged that "[t]he Census Bureau and many stakeholders expressed con-

cern that Option B . . . would negatively impact the response rate for non-citizens," which "could reduce the accuracy of the decennial census and increase costs for non-response followup ('NRFU') operations." *Id.* (emphasis omitted). "However," he continued, "neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially." *Id.* Secretary Ross cited three sources for this conclusion. First, he stated that he had "discuss[ed] the question with the national survey agency Nielsen" and that Nielsen had "stated that it had added questions from the ACS on sensitive topics such as place of birth and immigration status to certain short survey forms without any appreciable decrease in response rates." *Id.* Second, "the former director of the Census Bureau during the last decennial census" said "that, while he wished there were data to answer the [citizenship] question, none existed to his knowledge." *Id.* Third, "Nielsen's Senior Vice President for Data Science and the former Deputy Director and Chief Operating Officer of the Census Bureau under President George W. Bush also confirmed that, to the best of their knowledge, no empirical data existed on the impact of a citizenship question on responses." *Id.*

56. Secretary Ross noted that "the Census Bureau attempted to assess the impact that reinstatement of a citizenship question on the decennial census would have on response rates by drawing comparisons to ACS responses," as the Census Bureau had done in the January 19 Memo. *Id.*; *see* January 19 Memo, at AR 1279-80. Secretary Ross wrote that "such comparative analysis was challenging, as response rates generally vary between decennial censuses and other census sample surveys." Ross Memo 3, at AR 1315. For ex-

ample, the Census Bureau attributed higher response rates on the decennial census to "greater outreach and follow-up associated with the . . . decennial census" and to the comparatively short length of the decennial census questionnaire compared to the ACS. *Id.*

57. Secretary Ross also assessed the empirical data showing that Hispanics were disproportionately likely not to self-respond to citizenship questions. *See id.* at AR 1315-16. With regard to the ACS, he pointed out that many questions other than the citizenship question also have significant nonresponse rates. *Id.* at AR 1315. But in citing those other questions, he did not acknowledge any comparative response rates by race or ethnicity, citing only average nonresponse rates. *See id.* With regard to the decennial census, Secretary Ross acknowledged the Census Bureau's data showing that noncitizen households (compared to citizen households) were disproportionately less likely to self-respond to the 2000 long-form census questionnaire, which included a citizenship question, than to the short-form questionnaire, which did not. *See id.* at AR 1316. But, Secretary Ross wrote, the Census Bureau "was not able to isolate what percentage of decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey." *Id.* He concluded that "while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief." *Id.*

58. Secretary Ross next evaluated Alternative C, which would use administrative records *instead* of adding a citizenship question to the decennial census.

Id. He acknowledged that the Census Bureau had used administrative record data "since the early 20th century" and that administrative records often yield "more accurate" citizenship data than self-responses do. *Id.* "However," he wrote, "the Census Bureau is still evolving its use of administrative records, and the Bureau does not yet have a complete administrative records data set for the entire population." *Id.* He also acknowledged that the Census Bureau was able to match 88.6% of the population "with what the Bureau considers credible administrative record data" in the 2010 census. *Id.* But, he wrote, "[w]hile impressive, this means that more than 10 percent of the American population—some 25 million voting age people—would need to have their citizenship imputed by the Census Bureau. Given the scale of this number, it was imperative that another option be developed to provide a greater level of accuracy than either self-response alone or use of administrative records would presently provide." *Id.*

59. Secretary Ross explained that he had "asked the Census Bureau to develop" an Alternative D, which "would combine" Alternatives B and C. *See id.* His "judgment," the Memo announced, was that Alternative D "will provide DOJ with the most complete and accurate CVAP data in response to its request." *Id.* at AR 1317. Secretary Ross explained:

> Asking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer. This may eliminate the need for the Census Bureau to have to impute an answer for millions of people. For the approximately 90 percent of the population who are citizens, this

> question is no additional imposition. And for the approximately 70 percent of non-citizens who already answer this question accurately on the ACS, the question is no additional imposition since census responses by law may only be used anonymously and for statistical purposes. Finally, placing the question on the decennial census and directing the Census Bureau to determine the best means to compare the decennial census responses with administrative records will permit the Census Bureau to determine the inaccurate response rate for citizens and non-citizens alike using the entire population. This will enable the Census Bureau to establish, to the best of its ability, the accurate ratio of citizen to non-citizen responses to impute for that small percentage of cases where it is necessary to do so.

Id.

60. Secretary Ross addressed the possible effect on self-response rates of the citizenship question as set forth in Alternative D. *See id.* at AR 1319. He opined that "even if" addition of a citizenship question had "some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns. Completing and returning decennial census questionnaires is required by Federal law, those responses are protected by law, and inclusion of a citizenship question on the 2020 decennial census will provide more complete information for those who respond." *Id.* Secretary Ross then stated, without reference to any evidence or to the Census Bureau's conclusion that adding a citizen question would produce "substantially less accurate citizenship status data than are available from administra-

tive sources," January 19 Memo, at AR 1277, that "[t]he citizenship data provided to DOJ will be more accurate with the question than without it," Ross Memo 7, at AR 1319. He wrote that this "accura[cy]" was "of greater importance than any adverse effect that may result from people violating their legal duty to respond." *Id.*

61. Secretary Ross concluded: "I have determined that reinstatement of a citizenship question on the 2020 decennial census is necessary to provide complete and accurate data in response to the DOJ request." *Id.* at AR 1320. He also announced his decision to place the question "last on the decennial census form" to "minimize any impact on decennial census response rates." *Id.*

7. Secretary Ross's Testimony Before Congress

62. As the foregoing makes clear, the chronology of events in the initial Administrative Record produced on June 8, 2018, largely conformed to the chronology in the Ross Memo. According to the Ross Memo, the decision to add a citizenship question to the 2020 census began with the December 12, 2017 request from Arthur Gary, a career official at DOJ. *See* Ross Memo 1, at AR 1313. "Following receipt" of the Gary Letter, Secretary Ross claimed, he had "set out to take a hard look at the request." *Id.* The Memo did not mention any earlier discussions and efforts to propose addition of a citizenship question or any role in those discussions by White House personnel, political appointees at DOJ, or political appointees at the Commerce Department. *See id.* at AR 1313-14.

63. In sworn testimony before Congress around the same time, Secretary Ross repeated that the decision to add a citizenship question began with the Gary Let-

ter and denied White House involvement in the decision and discussions leading to the decision.

64. Before the House Appropriations Committee on March 20, 2018, for example, Representative José Serrano asked Secretary Ross whether "the President or anyone else in the White House [had] directed [him] to add this or a similar question to the 2020 census." *Hearings Before Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Comm. on Appropriations*, 115th Cong. 15 (2018) (admitted as an audio file at PX-491). Secretary Ross responded that the Department of Commerce was "responding *solely* to Department of Justice's request." *Id.* (emphasis added). Later in the same hearing, Representative Grace Meng asked Secretary Ross whether "the President or anyone in the White House discussed with you or anyone on your team about adding this citizenship question." *Id.* at 38 (admitted as an audio file at PX-493). Secretary Ross answered: "I am not aware of any such." *Id.*

65. Secretary Ross testified similarly before the House Ways and Means Committee on March 22, 2018. *See Hearing with Commerce Secretary Ross: Hearing Before the H. Comm. on Ways and Means*, 115th Cong. 1 (2018) (admitted as PX-480). Most relevant here, Representative Judy Chu asked if Secretary Ross could tell her "whether the Department of Commerce plans to include the citizenship question in the 2020 Census." *Id.* at 51. Secretary Ross responded that the "Department of Justice, as you know, *initiated* the request for inclusion of the citizenship question" to the decennial census. *Id.* (emphasis added).

66. Finally, before the Senate Subcommittee on Commerce, Justice, Science, and Related Agencies on May 10, 2018, Secretary Ross testified again that DOJ had initiated the request. *See Hearing on the F.Y. 2019 Funding Request for the Commerce Dep't Before the S. Appropriations Subcomm. on Commerce, Justice, and Science and Related Agencies*, 2018 WL 2179074 (May 10, 2018). Senator Patrick Leahy questioned whether a citizenship question was actually "necessary to enforce the Voting Rights Act." *Id.* He asked Secretary Ross: "[W]hy this sudden interest in that when the department that's supposed to enforce violations doesn't see any problems?" *Id.* Secretary Ross responded: "Well, the Justice Department is the one who made the request of us." *Id.*

67. In a brief filed with the Supreme Court in December 2018, Defendants argue that "[v]iewed in context," these statements should not be understood to imply that the Department of Commerce had not previously considered the issue or spoken with others in the Administration about it. Brief for the Petitioners at 27, *Dep't of Commerce v. U.S. Dist. Ct. for S.D.N.Y.* (Dec. 17, 2018) (No. 18-557), 2018 WL 6650094, at *27. Instead, they argue that Secretary Ross's response to Representative Serrano should be understood to mean that "no outside political parties or campaigns had made a request to which the Department of Commerce was responding"; that his statement to Representative Meng was in reference to an email purportedly sent by the Trump Reelection Campaign and thus only about "whether any political actors in the White House had made a formal request" about the citizenship question; that his response to Representative Chu pertained only to the "formal process" that began with the Gary Let-

ter; and that his assertion to Senator Leahy was meant only to "rebut[]" Senator Leahy's suggestion that DOJ did not see a problem with current VRA enforcement. *Id.* at 27-31 (emphasis omitted).

68. Defendants' *post hoc* interpretations of Secretary Ross's sworn statements to Congress are unconvincing. Viewed individually, even in context, none of the statements are limited in the ways Defendants suggest. And viewed together, the statements afford only one conclusion: Secretary Ross intended to convey the impression that the Gary Letter—and the Gary Letter alone—prompted consideration of whether to add a citizenship question to the census; that neither he nor anyone else at the Commerce Department prompted DOJ's request; and that he had not discussed the matter with White House officials before 2018. Moreover, nothing in Secretary Ross's March 26, 2018 Memorandum, in the rest of the Administrative Record, or in the relevant statutes and regulations supports the purported distinction between an "informal" and "formal" process.[17]

B. The Supplemental Administrative Record and the Trial Record

69. Secretary Ross's first version of events, set forth in the initial Administrative Record, the Ross Memo, and his congressional testimony, was materially inaccurate.

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[17] In any event, as the next part of this Opinion makes clear, there was nothing "informal" about the process predating DOJ's December 12, 2017 letter, which involved briefing books, legal memoranda, formal meetings, and inter-agency communications at both the staff and Cabinet secretary levels.

70. The first concrete sign of the inaccuracy came on June 21, 2018, when—"to provide further background and context regarding" Secretary Ross's decision—Defendants added a one-page "Supplemental Memorandum" signed by Secretary Ross himself, to the Administrative Record. *See* Docket No. 189.[18] In the Supplemental Memorandum, Secretary Ross admitted that "[s]oon after [his] appointment as Secretary of Commerce," he had begun considering "whether to re-

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[18] Ironically, in light of Defendants' own subsequent (and ongoing) efforts to limit the evidence this Court may consider, this "Supplemental Memorandum" presents a curious case for inclusion in the Administrative Record. In particular, its inclusion is hard to square with Defendants' contention that the Administrative Record *cannot* include materials that "did not exist until after the agency decision had been made." Docket No. 33, at 3 n.1 (internal quotation marks omitted); *see also* Brief for Petitioners at 21-22, *Department of Commerce v. United States Dist. Ct. for S.D.N.Y.*, 2018 WL 6650094, at *21-22 (arguing to the Supreme Court that review in this Court should focus on "the contemporaneous explanation of the agency decision that the agency rests upon," that courts must accordingly "confine review to a judgment upon the validity of the grounds upon which the agency itself based its action," and that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court" (citations, alterations, and internal quotation marks omitted)). Ultimately, however, the Court need not decide whether the Supplemental Memorandum is properly part of the Administrative Record (or, if not, whether it can be considered under one of the exceptions to the "record rule" discussed below), as the parties stipulated that it is part of the Administrative Record for purposes of this litigation. *See* Docket No. 517, at Joint Stip. ¶ 63; *see* Docket No. 523 (so-ordered version of the same). But, given the history of this litigation, the Court cannot help but note that it was *Defendants* who first sought to introduce material "outside" the Administrative Record into this case.

instate a citizenship question." AR 1321 ("June 21 Supplemental Memo"). He also acknowledged that "other senior Administration officials had previously raised" the issue, but he did not identify the officials by name. *Id.* He continued: "My staff and I thought reinstating a citizenship question could be warranted, and we had various discussions with other governmental officials about reinstating a citizenship question to the Census." *Id.* He then disclosed that, "[a]s part of that deliberative process," *he and his staff* had "inquired whether the Department of Justice . . . would support, *and if so would request*, inclusion of a citizenship question as consistent with and useful for enforcement of" the VRA. *Id.* (emphasis added).

71. After receiving Secretary Ross's Supplemental Memorandum, the Court ordered Defendants to complete the Administrative Record and authorized discovery beyond the Administrative Record. *See* Docket No. 199; *see also* July 3rd Tr. 76-89.[19]

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[19] The Court limited the scope of extra-record discovery, in the first instance, to DOJ and the Department of Commerce. *See* July 3rd Tr. 86. More specifically, the Court precluded any discovery from the White House or White House officials, and ruled that any discovery beyond DOJ and the Department of Commerce required either consent of Defendants or leave of Court. *See id.* at 86-87. In subsequent rulings, the Court strictly policed those limits. *See, e.g.*, Docket No. 495, at 21-23, 30-39 (denying or effectively denying several of Plaintiffs' open discovery demands); Docket No. 403 (denying Plaintiffs' motion to take *de bene esse* depositions or reopen depositions to address newly disclosed documents); Docket No. 369 (partially denying, on deliberative-process-privilege grounds, Plaintiffs' motion to compel production of documents); Docket No. 361 (partially denying, on attorney-client-privilege grounds, Plaintiffs' motion to compel documents); Docket No. 366,

72. The evidence disclosed as a result reveals a very different set of events from the one described in the initial Administrative Record, the Ross Memo, and Secretary Ross's congressional testimony. In particular, as outlined in depth below, the evidence shows that shortly after his confirmation as Secretary of Commerce, Secretary Ross discussed the addition of the citizenship question with then-White House advisor Steve Bannon, among others; that Secretary Ross wanted to add the question to the 2020 census prior to, and independent of, DOJ's December 12, 2017 request; that the Secretary and his aides pursued that goal vigorously for almost a year, with no apparent interest in promoting more robust enforcement of the VRA; that, believing they needed another agency to request and justify a need for the question, Secretary Ross and his aides worked hard to generate such a request for the citizenship question from DOJ; that these efforts included a direct intervention by Secretary Ross with Attorney General Sessions; and that these efforts ultimately succeeded, resulting in DOJ's request for a citizenship question. The evidence also reveals that DOJ deliberately (and unusually) did not explore whether there was a way to obtain the data it purportedly needed

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at 17 (denying Plaintiffs' motions to compel interrogatory responses); Docket No. 323 (memorializing a ruling from the bench partially denying Plaintiffs' motion to compel production of documents and to respond to interrogatories); Docket No. 303 (denying Plaintiffs' motion for leave to seek third-party discovery from Kris Kobach); Docket No. 261, at 3 (denying Plaintiffs' motion to compel documents "erroneously withheld" from the administrative record); Docket No. 204 (denying Plaintiffs' motion to shorten Defendants' time to respond to discovery requests and for additional deposition time).

that would not involve a citizenship question on the census. The Court now turns to this more complete story of Secretary Ross's decision.

1. Secretary Ross's Early Interest in Adding the Citizenship Question

73. The Senate confirmed Secretary Ross as Secretary of Commerce on February 27, 2017. *See* 163 CONG. REC. S1421, S1455 (2017). Two days later, on March 1, 2017, the Census Bureau briefed Secretary Ross on the census and the upcoming deadline to notify Congress about the proposed subjects for the census questionnaire. *See* AR 1410, 3685-86; PX-193 ("Ross Calendar"), at 1; Docket Nos. 510-2, 510-3 (together, "Langdon Dep.") at 81, 93-98; *see also* 13 U.S.C. § 141(f)(3).

74. At some point between February 27 and March 10, 2017, Secretary Ross asked his Deputy Chief of Staff and Director of Policy, Earl Comstock, why there was no citizenship question on the census. *See* Docket No. 490-2 ("Comstock Dep.") at 55. Comstock responded that he did not know, but would "check." *Id.* On March 10, 2017, Comstock sent Secretary Ross an email with the subject line: "Your Question on the Census." AR 2521. The email reported that the Census Bureau's webpage on apportionment was "explicit" that "all people (citizens and noncitizens) with a usual residence in the 50 states are to be included in the census and thus in the apportionment counts." *Id.* The email also included the text of a *Wall Street Journal* article titled "The Pitfalls of Counting Illegal Immigrants," which, Comstock noted, "confirms that neither the 2000 nor the 2010 Census asked about citizenship." *Id.*

75. Around this same time, Secretary Ross's interest in adding a citizenship question to the census first surfaced. Comstock, for example, first heard "about the notion of adding a question about citizenship to the decennial census" from the Secretary himself, "shortly after the confirmation." *Id.* at 54. In fact, some evidence suggests that Secretary Ross went even further in these early weeks and had actually decided to add the citizenship question already. According to Comstock, for example, Secretary Ross actually made a "request" to add the citizenship question "sometime in the spring"—"[p]otentially" as early as March 10, 2017 (when Comstock had emailed him the *Wall Street Journal* article). *Id.* at 146.

76. Although Secretary Ross acknowledges speaking with various "senior Administration officials" and "other governmental officials" about adding a citizenship question to the census around this time, AR 1321, the record is largely (and somewhat surprisingly) void of details regarding when these conversations occurred and with whom. But it does reflect that Secretary Ross discussed the topic with at least three outside officials. First, Secretary Ross discussed the topic with Attorney General Sessions "in the Spring of 2017 and at subsequent times." *See* Docket No. 379-1 ("Defs.' Second Supp. Interrog."), at 2-3 (admitted as PX-302). Second, on or about April 5, 2017, Secretary Ross spoke with White House advisor Steve Bannon, who asked "if he would be willing to speak to Kansas Secretary of State Kris Kobach about Secretary Kobach's ideas about a possible citizenship question on the decennial census." *Id.* at 3; AR 763-64, 2561. Third, complying with Bannon's request, Secretary Ross spoke with Kobach (who also served as Vice Chair of the since aborted Presi-

dential Commission on Election Integrity). *See* AR 763-64, 2561; Defs.' Second Supp. Interrog. at 2-3; Docket Nos. 509-2, 509-3 (together, "Teramoto Dep.") at 38-47. During that discussion, Secretary Ross and Kobach discussed the potential effect on "congressional apportionment" of adding "one simple question" to the census. AR 763-64.

77. After these conversations, Secretary Ross and his staff began to take action on the citizenship question, in part by contacting Mark Neuman, who was not then a government official but had served as the point person on census-related issues for the Trump Administration's transition team. Teramoto Dep. 126-27. On April 11, 2017, Neuman emailed Comstock a link to the Supreme Court's decision in *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) ("*LULAC*"), which considered CVAP data in assessing claims under Section 2 of the VRA. *See* PX-188 (AR); *see also* Comstock Dep. 155-56. On April 13, 2017, Comstock asked Neuman by email when the Census Bureau would need to "notify Congress" regarding census questions. AR 3709. Neuman responded the next day, informing Comstock that the notification deadline for census topics had already passed, but there would "be another opportunity next year" when the report of specific questions was due to Congress. AR 3709.

78. Secretary Ross soon began to express frustration with his staff's lack of progress on the citizenship question issue. On April 20, 2017, for example, he emailed Comstock, copying Wendy Teramoto, who was then his Senior Advisor and Chief of Staff. *See* AR

3694; Teramoto Dep. 78.[20] In the email, he noted that then-Director of the Census Bureau John Thompson was scheduled to meet with the Census National Advisory Committee on Racial, Ethnic and Other Populations on April 29, 2017, and he noted: "We must get our issue resolved before this!" AR 3694 (emphasis in original); *see* Comstock Dep. 137-41.

79. On May 2, 2017, Secretary Ross expressed even greater frustration. He emailed Comstock that he was "mystified why nothing ha[s] been done in response to [his] *months old request* that we include the citizenship question." AR 3710 (emphasis added).

80. A few hours later, Comstock responded. "On the citizenship question," he declared, "we will get that in place." *Id.*; PX-298(R), at RFA 63;[21] *see* Comstock Dep. 151-52. He explained that the specific questions on the census questionnaire were not due to Congress until March 2018. *See* AR 3710. In the meantime, Comstock wrote, "[w]e need to work with Justice to get them to request that citizenship be added back as a census question, and we have the court cases to illustrate that DoJ has a legitimate need for the question to

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[20] The email was sent from the account of Secretary Ross's personal assistant, but she noted in the subject line that she had tried unsuccessfully to send it from Secretary Ross's email and that "it's from him." AR 3694.

[21] PX-298(R), which was admitted into evidence on November 9, 2018, *see* Docket No. 518; Docket No. 518-1 at 19; Tr. 559, is "Defendants' Objections and Responses to Plaintiffs' Requests for Admission to Defendant United States Department of Commerce." The Exhibit is stamped with an (R) because it is a revised version of an earlier exhibit, not because of any connection to the Administrative Record. *See* Docket No. 518, at 1-2.

be included." *Id.* Comstock promised to "arrange a meeting with DoJ staff this week to discuss." *Id.*

2. Comstock's Search for a Rationale and an Agency to Request the Question

81. By May 2, 2017, Comstock had come to believe that the Commerce Department would need another agency to request addition of the citizenship question on the census because OMB and the Paperwork Reduction Act, 44 U.S.C. §§ 3501 *et seq.*, required the Commerce Department to "justify" why a citizenship question was "need[ed]." Comstock Dep. 153-54. Comstock acknowledged that simply "say[ing] the Secretary wanted" the question added would not "clear [the] legal thresholds." *Id.* at 154.

82. With this understanding, Comstock set out to find a "legal rationale" to support the Secretary's request to add a citizenship question, *id.* at 266, and to "find an agency that would have as reason" to do so, *id.* at 181. Comstock testified that he viewed it as his job to "help [the Secretary] find the best rationale" for adding the question, because "[t]hat's what a policy person does." *Id.* at 267. In his view, he did not "need to know what" the Secretary's actual "rationale might be, because it may or may not be one that is . . . legally-valid." *Id.*

83. On May 4, 2017, two days after promising Secretary Ross that he would "get [the citizenship question] in place," Comstock emailed Eric Branstad, the Senior White House Advisor at the Department of Commerce, asking him to identify the "best counterpart . . . at DOJ" to speak with "[r]egarding [the] Census." AR 3701; *see also* AR 12755; AR 2458 (same

as AR 12755 but with more redactions); AR 12756 (similar to AR 12755). Branstad advised Comstock to contact Mary Blanche Hankey, who had previously served as legislative counsel to then-Senator Jeff Sessions and, at the time, was the White House liaison at DOJ. *See* AR 3701, 12755.

84. Later that day, Comstock emailed Hankey and asked to set up a meeting. AR 2462; *see also* AR 12755; PX-298(R), at RFA 68. At some point that month, Comstock and Hankey spoke in person; "[a] few days later," Hankey "directed [Comstock] to James McHenry in the Department of Justice." AR 12755. McHenry was the Director of DOJ's Executive Office for Immigration Review; he had no responsibility for enforcement of the VRA. *See* Attorney General Sessions Announces Appointment of James McHenry As Director of the Executive Office for Immigration Review, Department of Justice (Jan. 10, 2018), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-appointment-james-mchenry-director-executive-office; PX-298(R), at RFA 71; Docket No. 491-2 ("Gore Dep."), at 65.

85. Comstock and McHenry "spoke several times . . . by phone." AR 12755. After these calls and "considering the matter further," McHenry told Comstock that "Justice staff did not want to raise the [citizenship] question given the difficulties Justice was encountering in the press at the time (the whole Comey matter)." *Id.*[22] McHenry referred Comstock instead

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[22] The "whole Comey matter" was presumably a reference to the firing of James Comey as Director of the Federal Bureau of Investigation, which occurred on May 9, 2017. *See* Michael D. Shear & Matt Apuzzo, *F.B.I. Director James Comey Is Fired by Trump,*

to Gene Hamilton at the Department of Homeland Security ("DHS"). *Id.* Comstock and Hamilton held "several phone calls to discuss the matter," but Hamilton "relayed that after discussion DHS really felt that it was best handled by Department of Justice." *Id.* Faced with these rejections by DOJ and DHS, Comstock turned to James Uthmeier, a lawyer at the Commerce Department. *Id.* He asked Uthmeier "to look into the legal issues and how Commerce could add the question to the Census itself." *Id.*

86. On May 24, 2017, Secretary Ross met "all afternoon" with various aides, including David Langdon, a Policy Advisor who reported to Comstock. AR 12542; *see also* AR 3702-04 (same as AR 12541-43 but with more redactions). During the meeting, Secretary Ross "seemed . . . puzzled why citizenship is not included in [the] 2020" census. AR 12541. At about 11 p.m. that night, Langdon emailed Lisa Blumerman, Acting Associate Director of the 2020 Decennial Census, asking her to respond immediately—"[i]deally this evening"—to his inquiry about a citizenship question. *Id.*; *see also* Langdon Dep. 172-74. Langdon reported to Comstock that he made that request. PX-543 (AR).

3. Secretary Ross and His Aides Persist in Their Efforts

87. Throughout July and August 2017, Secretary Ross and his staff continued to work internally, and with Kobach, to arrange for the addition of the citizenship question.

N.Y. Times (May 9, 2017), https://www.nytimes.com/2017/05/09/us/politics/james-comey-fired-fbi.html.

88. On July 14, 2017, Kobach emailed Secretary Ross to follow up on their April telephone conversation. *See* AR 763-64. Kobach wrote that the lack of a citizenship question on the census "impairs the federal government's ability to do a number of things accurately," and "also leads to the problem that aliens who do not actually 'reside' in the United States are still counted for congressional apportionment purposes." *Id.* at AR 764; PX-298(R), at RFA 81-82. Kobach stated that it was "essential that one simple question be added to the upcoming 2020 census," urging, in particular, a "slight variant" of the citizenship question that appears on the ACS. AR 763-64, at AR 764. Kobach did not mention the VRA or any rationale tied to VRA enforcement. *Id.*

89. On July 21, 2017, Kobach called Teramoto. *See id.* at AR 763. He also forwarded her his July 14, 2017 email to Secretary Ross. *See id.* In a note above the forwarded email, Kobach wrote that he had "spoken" to Secretary Ross about the addition of citizenship question to the census "at the direction of Steve Bannon." *Id.*; *see also* PX-298(R), at RFA 83. He asked "to schedule a short call." AR 763. In response to this email, Teramoto arranged a call between Kobach and Secretary Ross. *See id.* Teramoto would later testify that she had "no recollection of ever speaking" with Kobach. Teramoto Dep. 40-45. She also testified that she had "no idea" who Kobach was, *id.*, even though the email he forwarded to her began with the line: "Kansas Secretary of State Kris Kobach here." AR 764.[23] On or about July 25, 2017,

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[23] Throughout her deposition, Teramoto professed not to recall various events and people of significance, including direct commu-

Secretary Ross spoke with Kobach about the addition of a citizenship question to the decennial census. *See id.*; Ross Calendar. at 8, 40; PX-298(R), at RFA 84.

90. On August 8, 2017, Representative Mark Meadows and Secretary Ross spoke by telephone. Ross Calendar at 9. Later that day, Secretary Ross emailed Comstock to ask "where" DOJ was "in their analysis" of whether to request the addition of a citizenship question. *See* AR 4004; PX-298(R), at RFA 91; *see also* Comstock Dep. 213. Secretary Ross advised: "If [DOJ] still have not come to a conclusion please let me know your contact person and I will call the AG." AR 4004; PX-298(R), at RFA 92; Comstock Dep. 214. Comstock immediately responded to Secretary Ross, writing that he would "be back shortly with an update." AR 4004; PX-298(R), at RFA 93.

91. The next day, August 9, 2017, Comstock responded again by email to Secretary Ross about their internal analysis of the citizenship question. *See* AR 12476; *see also* AR 3984 (same as AR 12476 but with more redactions). He wrote: "[W]e are preparing a memo and full briefing for you on the citizenship question. The memo will be ready by Friday." AR 12476. Critically, Comstock cautioned: "Since this issue will go to the Supreme Court we need to be diligent in preparing the administrative record." *Id.* Secretary Ross responded that he "would like to be briefed on Friday by phone" and added that "we should be very careful,

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nications with the Attorney General and his close aides that were memorialized in contemporaneous emails. *See, e.g.*, Teramoto Dep. 74-78, 83-85. This lack of memory is noteworthy, but ultimately has only limited significance given the extent of other evidence available on the topics at issue.

about everything, whether or not it is likely to end up in the SC." *Id.*

92. On August 11, 2017, Comstock and Uthmeier exchanged edits on briefing materials regarding the citizenship question for Secretary Ross. In one email, Uthmeier shared "recommendations on execution." PX-607 (AR), at 2; AR 11343-45 (redacted version). Uthmeier stated that "our hook" was "[u]ltimately, we do not make decisions on how the [citizenship] data will be used for apportionment, that is for Congress (or possibly the President) to decide." PX-607 (AR), at 2. Later the same day, Comstock emailed Secretary Ross and Teramoto a memorandum prepared by Uthmeier regarding the addition of a citizenship question to the census. *See* AR 2461; *see also* AR 11362. (The Memorandum itself was withheld by Defendants—with the Court's blessing, *see* Docket No. 361—on the basis of attorney-client privilege and, thus, is not part of the record.)

93. On August 21, 2017, senior Commerce Department personnel met regarding the citizenship question. *See* AR 2461. Attendees included Teramoto; Comstock; Peter Davidson, the newly appointed Commerce Department General Counsel, *see* 163 CONG. REC. S4781, S4897 (2017); and Under Secretary Kelley, who oversaw the operations of the Census Bureau, *see id.* *See* AR 2461; Docket No. 493-2 ("Kelley Dep."), at 25. During their respective depositions, however, Comstock, Teramoto, and Under Secretary Kelley denied having any recollection of the August 21, 2017 meeting. *See* Comstock Dep. 221; Teramoto Dep. 54-58; Kelley Dep. 91-92.

94. On September 1, 2017, Secretary Ross complained to Comstock and Teramoto that he had "received no update" on "the issue of the census question." AR 2424; *see also* AR 4002-03, at AR 4002. Comstock responded: "Understood. Wendy and I are working on it." AR 4002-03, at AR 4002.

95. On September 6, 2017, Secretary Ross met with various aides, including Under Secretary Kelley, Teramoto, Comstock, Davidson, and Uthmeier, to discuss addition of the citizenship question. *See* AR 1411-12; AR 1996-97; AR 2426-28; Ross Calendar 11 ("Staff Briefing: Census Legal Question"); *see also* AR 1998-99 (same email chain as AR 1996-97); AR 2429-30 (same email chain as AR 2426-28). Uthmeier prepared a briefing book for the meeting, which he gave to at least Under Secretary Kelley. *See* AR 1996-97, at AR 1996; Docket No. 253 ("Uthmeier Decl."), ¶ 3. The briefing book is not part of the record, however, apparently because none of the participants in the meeting retained a copy. *See* Pls.' Proposed Findings ¶ 383. At their depositions, Under Secretary Kelley, Comstock, and Teramoto denied having any recollection of the meeting. *See* Comstock Dep. 221; Teramoto Dep. 58-61; Kelley Dep. 105-07.

96. The day after the meeting with Secretary Ross, Comstock emailed Uthmeier and Davidson that Secretary Ross "would like an update on progress since the discussion yesterday regarding the citizenship question." AR 2034; *see also* AR 2395-96; AR 2459-60. Later that day, Davidson wrote to Comstock, Uthmeier, and Teramoto expressing "concern[] about" directly contacting Kobach—whom Secretary Ross had mentioned in the September 6, 2017 meeting. PX-614 (AR).

Instead, Davidson recommended contacting a "trusted" advisor, such as Neuman, "before we do anything externally." *Id.*

97. Consistent with that recommendation, Uthmeier sent Neuman an email on September 8, 2017, with the subject line "Questions re Census," and asking if Neuman had a "few minutes" that morning "to discuss." AR 2051. That same day, Comstock sent Secretary Ross a memorandum reporting on his—as yet unsuccessful—efforts to find an agency that would request addition of a citizenship question to the 2020 census. *See* AR 12755; PX-298(R) at RFA 96. The memorandum summarized Comstock's prior discussions with Hankey and McHenry of DOJ, and with Hamilton of DHS, and noted that none had expressed interest in requesting the addition of the citizenship question on the census. *See* AR 12755.

4. Secretary Ross's Intervention with the Attorney General

98. By sometime in late summer 2017, Secretary Ross was plainly out of patience with Comstock's failed efforts to get DOJ to request the citizenship question and decided to take matters into his own hands by contacting Attorney General Sessions directly. The precise date of his first communication on the census topic with the Attorney General during that period is unclear. *See* AR 1321; Gore Dep. [illegible] 34; *see also* Defs.' Second Supp. Interrog. 2-3. But around Labor Day, the Attorney General spoke then-Acting Assistant Attorney General for Civil Rights John Gore ("AAAG Gore") about requesting the addition of a citizenship question. Gore Dep. 83. AAAG Gore learned that Secretary Ross had "initiated" an earlier discussion

with Attorney General Sessions about a citizenship question. *Id.* at 83-84.

99. Until September 13, 2017, the conversations between the Commerce Department and DOJ about the citizenship question had been "initiated by the Department of Commerce." Gore Dep. 67-68, 91-98. But on that date, AAAG Gore initiated contact with Teramoto. He sent Teramoto an email introducing himself and asking "to talk about a DOJ-DOC" issue, referring to the addition of a citizenship question to the 2020 census. AR 2628-29, at AR 2629; AR 2634-35 (same email chain); Gore Dep. 95-97. And for the next couple months, AAAG Gore served as the primary contact at DOJ about the citizenship question issue. Gore Dep. 91-92, 94-95.

100. A few days later, on or about September 16, 2017 (a Saturday), AAAG Gore and Teramoto spoke by telephone. *See* AR 2628-29, at AR 2628; AR 2639. Later that day, AAAG Gore put Teramoto in touch with Danielle Cutrona, an aide to Attorney General Sessions. *See* AR 2639. In his email introducing them, AAAG Gore explained that "Danielle is the person to connect with about the issue we discussed earlier this afternoon," namely the citizenship question. *Id.*; AR 2651-52; AR 2653-54; Gore Dep. 102-03.

101. Teramoto asked Cutrona to "let [her] know when the AG is available to speak to Secretary Ross." AR 2639. In response, Cutrona sent Teramoto Attorney General Sessions' cellphone number and stated: "From what John [Gore] told me, it sounds like we can do whatever you all need us to do and the delay was due to a miscommunication. The AG is eager to assist." AR 2651; Gore Dep. 105-06.

102. On September 18, 2017, Secretary Ross spoke again to Attorney General Sessions about adding a citizenship question to the census. *See* AR 2528; AR 2636; Gore Dep. 111-12. The next day, on September 19, 2017, Secretary Ross sent an email with the subject "Census" to Davidson. AR 2528. The email said: "Wendy [Teramoto] and I spoke with the AG yesterday. Please follow up so we can resolve this issue today." *Id.*

5. AAAG Gore Ghostwrites the DOJ Letter

103. Over the next three months, relying heavily on the VRA rationale first proposed by the Department of Commerce, political appointees in DOJ—led by AAAG Gore—drafted the letter requesting addition of the citizenship question on the decennial census.

104. Notably, in drafting the letter, AAAG Gore relied not only on the Commerce Department's proposed rationale, but also on its work product and its advisors. For example, he spoke with Uthmeier, the Commerce Department lawyer who had drafted the August 11, 2017 legal memorandum on the issue for Secretary Ross. *See* Gore Dep. 117-19. After they spoke, AAAG Gore received a copy of the memorandum and a handwritten note from Uthmeier. *See id.*; *see also* AR 2461 (email referencing August 11 memo). At his deposition, AAAG Gore stated that "[t]he note contained information regarding [the citizenship question] issue that was considered by the Department of Justice in drafting its request," that is, the December 12, 2017 Gary Letter. *Id.* 123-24. AAAG Gore acknowledged, however, that Uthmeier had no experience with, or responsibility for, enforcement of the VRA. *See id.* at 117-18.

105. AAAG Gore also communicated directly with Neuman, who was advising Secretary Ross and his aides on the issue and who appears to have been the first to float the VRA rationale for adding the question. *See* Gore Dep. 437-38; *see also* PX-188 (AR); Comstock Dep. 155-56. (Neuman, in turn, kept the Commerce Department abreast of his dealings with DOJ. For example, on Sunday, October 8, 2017, Secretary Ross emailed Davidson with the subject line "Letter from DoJ," asking "what is its status?" AR 2482. Davidson responded: "I'm on the phone with Mark Neuman right now . . . he is giving me a readout of his meeting last week." *Id.*) AAAG Gore knew that Neuman "was advising the Department of Commerce and the Census Bureau with respect to this issue" as well. Gore Dep. 437-38.

106. By November 1, 2017, AAAG Gore had completed a draft of what would become the Gary Letter. *See* Gore Dep. 126-27. He solicited feedback on the draft from only a few people in DOJ. AAAG Gore emailed the draft letter to Chris Herren, Chief of DOJ's Voting Section, asking for Herren's input. Gore Dep. 126-27. AAAG Gore knew that Herren was a career DOJ official. *See* Gore Dep. 151-53. AAAG Gore also copied Ben Aguiñaga on his email, and authorized Aguiñaga to forward it to Bethany Pickett. *See* Gore Dep. 133. AAAG Gore knew that Aguiñaga and Pickett were both political appointees. *See id.* AAAG Gore also knew that both Aguiñaga and Pickett had recently graduated from law school and that neither had any experience as counsel in VRA cases or in assessing the reliability of CVAP data used in VRA litigation. *See id.* at 134-35.

107. Herren, Aguiñaga, and Pickett provided substantive feedback on the initial draft of the letter. *See id.* at 136-37. AAAG Gore also received edits on a "near-final" version of the draft letter from Rachael Tucker, then counsel in the front office in the Office of the Attorney General, and Robert Troester, then Associate Deputy Attorney General. *See id.* at 139-42. Like Aguiñaga and Pickett, neither Trucker nor Troester had any experience as counsel in VRA cases or in assessing the reliability of CVAP data used in VRA litigation. *See id.* at 140.

108. Tucker's and Troester's edits were the last substantive edits made to the letter before it was sent. *See id.* at 142, 146. AAAG Gore did not recall receiving any input or edits from career DOJ Civil Rights Division staff other than the first round of edits from Herren. *See* Gore Dep. 152-53.

109. On or about November 26, 2017, Secretary Ross spoke with President Trump. PX-298(R), at RFA 103. The next evening, Secretary Ross sent Davidson an email with the subject "Census Questions." AR 11193. The email said that the Census Bureau "is about to begin translating the questions into multiple languages and has let [sic] the printing contract. We are out of time. Please set up a call for me tomorrow with whoever is the responsible person at Justice. We must have this resolved." *Id.*; PX-298(R), at RFA 105. AAAG Gore called Davidson that afternoon, but the record does not reflect whether they spoke. *See* AR 2496.

110. Ultimately, Attorney General Sessions made the decision that DOJ would send the letter to request that the Census Bureau add a citizenship question to the census. *See* Gore Dep. 442. The final authoriza-

tion to AAAG Gore to send the letter came from Tucker or Troester on behalf of the Attorney General. *See id.* at 158-60.

111. Although AAAG Gore—a political appointee—was the principal drafter of the letter, he did not sign or send it; instead, those tasks fell to Arthur Gary, a career DOJ official. On December 8, 2017, AAAG Gore emailed Gary a copy of the letter "with leadership's final changes." *See id.* at 145. He wrote that "[w]ith these changes, we are authorized to send. Sending on Monday is fine." *Id.* at 146-47. On Tuesday, December 12, 2017, Gary sent the final version of the letter to Dr. Jarmin. AR 663-65; *see also* AR 5489-91; Gore Dep. 155.

112. The Gary Letter was the first time that DOJ communicated to the Census Bureau that its existing CVAP data was not ideal for VRA enforcement purposes. *See* Tr. 996. Dr. Abowd testified at trial that "prior to December 2017 . . . , the Census Bureau had never heard from the Department of Justice that existing CVAP data . . . was not ideal for purpose of DOJ's VRA enforcement work." *Id.* AAAG Gore understood that before the Gary Letter was sent, DOJ had not reached out to the Department of Commerce to initiate a conversation "for the purposes of obtaining better data to enforce the Voting Rights Act." Gore Dep. 67-68. He was also aware that DOJ "staff did not want to raise the [citizenship] question" in the fall of 2017. *Id.* at 68-69.

113. AAAG Gore, the primary drafter of the DOJ letter requesting improved data, admitted that he believes "that CVAP data collected through the census questionnaire is not necessary for DOJ's VRA enforce-

ment efforts." *Id.* at 300. AAAG Gore also testified that he had "no understanding of what the Census Bureau is going to do or what data it's going to provide [DOJ] in the future related to this request," *id.* at 215-16; that he did not "understand . . . any margin of error" associated with the data the Census Bureau will obtain through the citizenship question on the census, *id.* at 224-25; and that he did not "know whether or not CVAP data produced from responses to the citizenship question . . . will, in fact, be more precise than the CVAP data on which the DOJ is currently relying for purposes of VRA enforcement," *id.* at 232-33. AAAG Gore testified that he is not aware of any communications between DOJ and the Census Bureau on these subjects. *Id.* at 228, 233-34.

114. In short, although the letter AAAG Gore drafted states that the "decennial census questionnaire is the most appropriate vehicle" for collecting "reliable" CVAP data for purposes of enforcing the VRA, Gary Letter at AR 663, AAAG Gore admitted that he did not know whether citizenship data obtained through the census would in fact be "more precise than the CVAP data on which DOJ is currently relying for purposes of VRA enforcement," Gore Dep. 233.

6. The Attorney General Forbids DOJ to Meet with the Census Bureau

115. Throughout December 2017 and January 2018, Census Bureau staff sought to meet with DOJ officials to better understand their request and to discuss other ways to satisfy DOJ's interest in more granular CVAP data. *See* AR 3289; AR 8651; Docket No. 511-2 ("Jarmin Dep.") at 64. The DOJ rebuffed these attempts.

116. On December 22, 2017, for example, Dr. Jarmin emailed Gary that "the best way to provide PL94 block-level data with citizen voting population by race and ethnicity would be through utilizing a linked file of administrative and survey data the Census Bureau already possesses. This would result in higher quality data produced at a lower cost." AR 3289; *see also* PX-297, at RFA 184; Tr. 961-62. Dr. Jarmin suggested a "meeting of Census and DOJ technical experts to discuss the details of this proposal." AR 3289.

117. Dr. Jarmin repeatedly followed up with Gary. On January 2, 2018, Dr. Jarmin sent Gary a follow-up email requesting a meeting the following week. *See* AR 5490. Gary, in turn, informed AAAG Gore that Census Bureau officials were attempting to arrange a meeting between the Census Bureau and DOJ. *See* Gore Dep. 262-63. AAAG Gore also learned from Gary that the Census Bureau had an alternative means for providing the DOJ with block-level CVAP data. *See id.* at 265-66. AAAG Gore told Gary that he "would think about the issue and discuss it further with others." *Id.* at 264. AAAG Gore did not ask Gary to get more information about the specifics of the Census Bureau's alternative proposal. *See id.* at 268.

118. AAAG Gore then discussed the matter with several DOJ officials, including Attorney General Sessions at an in-person meeting. *See id.* at 265, 268-69. Attorney General Sessions decided "not to pursue the Census Bureau's alternative proposal." *Id.* at 271-72. To AAAG Gore's knowledge, the reasons for the Attorney General's decision not to pursue the alternatives were not memorialized anywhere. *Id.* at 272. To this

date, Defendants have not identified any reason for DOJ's decision not to meet with the Census Bureau.

119. DOJ eventually "communicated that it did not want to meet with the Census Bureau to discuss alternative sources of block-level CVAP data other than a citizenship question on the decennial census questionnaire." PX-297, at RFA 200. On February 6, 2018, almost two months after first suggesting a technical meeting to DOJ, Dr. Jarmin reported to the Census Bureau and Commerce staff that DOJ did not want to meet. *See* AR 3460; AR 9074. He wrote that he had "spoken with DOJ leadership. They believe the letter requesting citizenship be added to the 2020 Census fully describes their request. They do not want to meet." AR 3460; AR 9074; Docket Nos. 502-2, 502-4 (together, "Census Bureau 30(b)(6) Dep."), at 98.[24]

120. Thus, no meeting between the Census Bureau's and DOJ's technical experts took place before Secretary Ross issued his March 26, 2018 Memorandum announcing his decision to add the citizenship question. *See* Census Bureau 30(b)(6) Dep. 96; Gore Dep. 259; PX-297, at RFA 170, 195, 196.

121. DOJ officials' refusal to meet with the Census Bureau to discuss their request for data was highly "unusual." Census Bureau 30(b)(6) Dep. 98-99. It is standard operating procedure for the Census Bureau to hold a technical meeting with the agency requesting

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[24] The Census Bureau's Rule 30(b)(6) deposition was conducted over two days—August 29 and October 5, 2018—and appears on the docket in two volumes with consecutive pagination. *See* Docket No. 502-2 (Volume I, consisting of pages 1-339); Docket No. 502-4 (Volume II, consisting of pages 340-464).

additional data to discuss the best way to deliver usable data for a particular use. *See* Tr. 1248; *see also* Thompson Decl. ¶ 60. As Dr. Abowd testified, when "an agency has requested a statistical product that cannot be produced with current public estimates, we would normally expect to meet with that agency to determine . . . the use case, the application, what they wanted to do, and why they felt that our current products did not serve that need. That would be normal." Tr. 1248. And as former Census Bureau Director Thompson explained, input from subject matter experts—usually consisting of "staff from both the Census Bureau and the requesting agency"—is "essential to the development of a new question" for a survey. Thompson Decl. ¶ 60. That is because "[t]hese experts help ensure that the Census Bureau has a clear understanding of the desired uses of the new data so that the new question can be worded to achieve the desired outcome." *Id.*; *see also* Habermann Aff. ¶ 29 ("[A meeting between the Census Bureau and the requesting agency] allows the technical experts to better understand how the Census Bureau can meet the needs of the proposers. It also allows for a discussion of alternative ways of meeting a request.").

122. Neither the Census Bureau nor AAAG Gore is aware of any instance, other than the request to add a citizenship question to the decennial census questionnaire, in which DOJ has requested data from the Census Bureau and then declined to meet to discuss that request. PX-297, at RFA 201; Gore Dep. 282.

123. The fact that the Attorney General himself made the decision not to allow DOJ officials to meet with the Census Bureau is also highly unusual. Dr.

Abowd, the Census Bureau's Chief Scientist and Defendants' own expert, testified that he was unaware of any other circumstance in which a Cabinet Secretary personally directed agency staff not to meet with the Census Bureau and that DOJ's refusal in this case was thus "unusual." Tr. 962-65. Dr. Abowd opined that Attorney General Sessions's decision constituted improper "political influence" on the decision-making process. Tr. 1267-68.

7. Efforts to Downplay Deviations from the Census Bureau's Standard Processes

124. As noted above (by way of background only), in recent decades, the Census Bureau has adhered to a fairly robust process in evaluating whether to add new questions to any data-collection instrument, including the census. AR 9865, 9867; AR 3560; AR 3890-91; Thompson Decl. ¶¶ 45, 47-49. That process includes rigorous pre-testing. In fact, the Census Bureau's "Statistical Quality Standards," issued in 2010, explicitly require pre-testing of any question to be added to a survey such as the census, unless the Census Bureau obtains a waiver or uses a question that has "performed adequately in another survey." PX-260, at vii, 8; *see also* PX-364 ("If there is insufficient evidence about how well a question performs, the question must be subjected to some form of questionnaire pretest.").

125. Initial plans for the 2020 census adhered to the Census Bureau's historical practices and Statistical Quality Standards. All questions on the 2010 census had been the subject of extensive cognitive testing and field testing. *See* Tr. 997. And the Census Bureau began testing potential improvements for the questions on race and ethnicity for the 2020 census more than *ten*

years before the census, in 2008. *See* Thompson Decl. ¶ 49. The Census Bureau sought community feedback on the proposed changes in 2014 and 2015, and then conducted additional testing in 2015. *See id.* ¶¶ 50-53. Despite that extensive testing, the Census Bureau opted not to make the proposed changes to the questions on race and ethnicity because a final decision had not been made as of December 31, 2017, leaving inadequate time to deliver the final question wording to Congress two years prior to the census, as required by Section 141(f)(2). *See id.* ¶ 54.

126. Additionally, on April 29, 2016, Lisa Blumerman, Associate Director of Decennial Census Programs, issued a memorandum "officially document[ing] the U.S. Census Bureau's plan to develop and transmit to Congress" the questions planned for the 2020 decennial census. PX-271, at 1; *see also* Tr. 995. To the extent relevant here, the Memorandum invited "[f]ederal agencies with known uses of the 2020 Census or ACS content" to submit any requests for data collection by July 1, 2016. PX-271, at 3. Blumerman explained that "[f]inal proposed questions are based on the results of extensive cognitive testing, field testing, other ongoing research, and input from advisory committees." PX-271, at 4; Tr. 995-96.

127. Despite these plans and the Census Bureau's Statistical Quality Standards, neither the Census Bureau nor the Commerce Department conducted any pretesting of the citizenship question before Secretary Ross made the decision to add it to the 2020 census questionnaire. There was no cognitive testing, field testing, or randomized control testing of the question, nor was there any testing of the question within the

context of the entire questionnaire or consultation with the Census Bureau's advisory committees or outside researchers with relevant expertise. *See* Tr. 156-57, 736-37, 925-26, 997-98, 1279-80; Thompson Decl. ¶¶ 60, 71, 77; Census Bureau 30(b)(6) Dep. 142-43, 426-27; Habermann Aff. ¶¶ 56-58. The one "end-to-end" test —in essence, a form of dress rehearsal—conducted for the 2020 census did not include the citizenship question. Tr. 92, 155-56, 998, 1096; Census Bureau 30(b)(6) Dep. 225.

128. Nor did the Census Bureau apply for, let alone receive, a waiver from the pre-testing requirement for the citizenship question. Tr. 1279. And while Secretary Ross opted to use a question that had previously appeared on the ACS, the record establishes that it has not "performed adequately" within the meaning of the Census Bureau's Statistical Quality Standards. For example, 32.7% of all people identified as noncitizens by administrative records reported themselves as citizens on the 2010 ACS. *See* January 19 Memo, at AR 1280. For the 2016 ACS, that figure was 34.7%. *See id.* Defendants' own expert witness, Dr. Abowd, acknowledged that the Census Bureau views this "disagreement" between the ACS survey responses and administrative records—which are generally viewed as more accurate—as a "problem with the ACS citizenship question." Tr. 1282. In fact, he opined that, in light of the disagreement rate, the citizenship question on the ACS has not "performed adequately." *Id.* at 1286-88; *see also* Defendants' Post-Trial Proposed Findings of Fact and Conclusions of Law Regarding Plaintiffs' Claims, Docket No. 546 ("Defs.' Post-Trial Br."), at 62, ¶ 420 (conceding that "the citizenship question does not appear to be performing adequately on the ACS").

129. Thus, the failure to conduct any pretesting of the proposed citizenship question on the decennial census questionnaire was a "significant deviation" from the Census Bureau's historical practices, its own mandatory Statistical Quality Standards, and its previously announced plans for the 2020 census. *See* Thompson Decl. ¶ 96; AR 3890-91; AR 2304; AR 9865, 9867; Tr. 1264. Yet, Secretary Ross and the Commerce Department tried to downplay, if not conceal, the degree of that deviation. The Court will address four examples of these efforts.

a. Secretary Ross's Claim that the Question Was Well Tested

130. First, Secretary Ross described the citizenship question as "well tested" in his March 26, 2018 Memorandum. Ross Memo 2, at AR 1314. He did not, however, describe that testing or even define what he meant by "well tested." *See id.* at AR 1313-20. Nor did Secretary Ross make any effort to reconcile his characterization of the question as "well tested" with the poor performance of the question on the ACS—that is, the high disagreement rate between survey responses and administrative records. *See id.* at AR 1316. Ironically, Secretary Ross himself noted this high disagreement rate when explaining his reasons for rejecting Alternative C. *See id.*

131. There is no basis in the record to dispute Dr. Abowd's assessment—which he conveyed to Secretary Ross in advance of the March 26, 2018 Memorandum—that the citizenship question was "well tested" for purposes of the ACS. *See* Tr. 1254-55, 1288; *see also* Tr. 568 (testimony of Thompson, former Census Bureau Director, that testing of the citizenship question for use

on the ACS was "complete and thorough"). But the fact that the question was "well tested" for purposes of the ACS does *not* mean that the question is well tested for purposes of the decennial census. Nor does it mean that the testing was consistent with the Census Bureau's own standards and historical practices.

132. To the contrary, the record supports the conclusion of experts in the field that the question was not well—or even adequately—tested for purposes of the decennial census questionnaire. That view is shared by: (1) six former Census Bureau Directors, in both Republican and Democratic Administrations, including Dr. Thompson (whom Defendants' own expert described as "the expert in this trial who's most deserving of weight on his testimony), AR 8555-56; Tr. 1192; Thompson Decl. ¶¶ 93-96; (2) Plaintiffs' experts, Dr. Hillygus and Dr. Barreto, Tr. 157, 737-38; (3) the National Academies of Sciences, Engineering, and Medicine's Committee on National Statistics' Task Force on the 2020 Census, PX-539; and (4) the American Statistical Association, the American Sociological Association, and the Population Association of America, "three leading national associations of professional and academic statisticians, sociologists and demographers," Brief of the American Statistical Association et al. as *Amici Curiae* Supporting Plaintiffs, Docket No. 420-1, at 1, 4-9.

133. Defendants did not present any evidence to dispute the conclusion that the citizenship question has not been "well tested" for purposes of the 2020 census questionnaire. Instead, their own expert, Dr. Abowd, agreed that "[i]t would not be appropriate to describe it as well-tested in the context of the 2020 questionnaire.

That is simply not true. . . . It hasn't ever been tested in that context." Tr. 1330.

134. There are several reasons that the testing conducted for the citizenship question on the ACS is not adequate for purposes of the decennial census questionnaire. First, although superficially similar, there are salient differences between the ACS and the decennial census. *See* Docket No. 456 ("Defs.' Pretrial Reply Br."), at 5 (conceding that the ACS is "a different instrument with different considerations and goals"). The primary purpose of the census is to obtain an "actual Enumeration" of the entire population of the country, *see* U.S. Const. art. I, § 2, cl. 3, while the ACS is "intended to provide information on the characteristics of the population, and the social and economic needs of communities," Thompson Decl. ¶ 32. And while the census strives for an "actual Enumeration" through an actual count of every household in the country, ACS estimates are statistical estimates based on a sample of United States households. Thompson Decl. ¶¶ 32-33; Tr. 805, 1027-28. Additionally, the ACS is a much longer questionnaire than the decennial census questionnaire. It includes dozens of questions—depending on household composition and housing status, a household might have to answer more than seventy questions—while the 2020 census questionnaire will contain either ten or eleven questions (depending on whether the citizenship question appears on it). *See* Tr. 87, 889, 1146; Thompson Decl. ¶ 63. A question concerning citizenship may take on added significance in the context of the much shorter decennial census questionnaire. *See* Thompson Decl. ¶ 63; Tr. 87-88. Thus, a test of the question in the context of the ACS questionnaire has only lim-

ited relevance to how the question will perform in the context of the census questionnaire.

135. Second, and related, the question order and context for the question in the ACS (as well as on the 1950 census questionnaire and the long-form questionnaire, both of which were also referenced by Secretary Ross in his March 26, 2018 Memorandum) are different than they would be on the census questionnaire. On the online ACS (and the prior census questionnaires), the question was preceded by a question about "nativity" —that is, place of birth—and only those who indicated that they were born outside of the United States were asked to disclose citizenship status. Tr. 159-60, 1274-75. By contrast, at present, the 2020 decennial census will ask about citizenship without a preceding nativity question—and it will be asked of all respondents. PX-489; Census Bureau 30(b)(6) Dep. 22-23; Thompson Decl. ¶ 66; Tr. 1275. Such differences in "sequencing" and context can affect response rates. Census Bureau 30(b)(6) Dep. 14; Tr. 159-60; Thompson Decl. ¶¶ 63-66.[25]

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[25] Secretary Ross asserted in his March 26, 2018 Memorandum that placing the citizenship question at the end of the questionnaire will "minimize any impact on decennial response rates." Ross Memo at AR 1320. Notably, however, he cited no empirical support for that assertion. And there are reasons to believe that such placement would have less of an effect than Secretary Ross expects. That is, census respondents are directed to answer all of the questions on the questionnaire sequentially for each member of their household. That means that respondents will see the citizenship question when they answer the census questionnaire for the first member of the household, and before they answer any questions about other members of the household. *See* Tr. 161. Additionally, on a paper form, respondents can view all of the questions before completing any of it. So it is impossible to determine

136. Finally, the ACS was last tested in 2006, and the macroenvironment has changed in important ways since then. *See* Tr. 737, 1252, 1258-59. In particular, the undisputed evidence—including the Census Bureau's own research—indicates that respondents are likely to react differently to a citizenship question in 2020 than they would have reacted only three years ago, let alone thirteen years ago. *See id.* at 616, 619-20, 737, 1258-59. Thus, testing conducted thirteen years ago has only limited relevance to how the question will perform on the 2020 census.

137. In short, while the citizenship question may have been "well tested" for the purposes of the ACS (and earlier versions of the census questionnaire, including the "long-form" questionnaire used until 2000), it is not "well," or even adequately, tested for purposes of the 2020 census questionnaire. Thus, Secretary Ross's statement that the question is "well tested" is misleading at best.

b. The Commerce Department Revises the Census Bureau's Description of the "Well-Established Process" for "Adding or Changing Content on the Census"

138. The record contains evidence of another, more deliberate, effort to downplay the degree to which Secretary Ross's decision to add the citizenship question deviated from the Census Bureau's past practices and standards. In late January 2018—after the Census Bureau's initial, critical assessments of DOJ's request to add the question—senior aides to Secretary Ross,

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whether Secretary Ross's proposed placement will "minimize any impact on decennial response rates" without proper testing.

including Comstock and Uthmeier, developed a set of thirty-five questions for the Census Bureau to answer for the Secretary. AR 1976-78; Tr. 1004-05.

139. Dr. Abowd took the lead in coordinating the Census Bureau's responses to the questions. *See* Tr. 1005. In particular, he maintained the "control" or "master" copy of the responses to the questions, which represented the final and official position of the Census Bureau, as Dr. Abowd understood them. *Id.* 1010-11. After some back and forth with aides to Secretary Ross about some of the responses, *see* Tr. 1005, 1013-14; AR 9190, 13023; AR 2292; AR 2294-2305, Dr. Abowd provided a final set of responses on March 1, 2018 (with his memorandum comparing Alternatives C and D), *see* AR 9812-33.

140. The thirty-first question on the list asked: "What was the process that was used in the past to get questions added to the decennial Census or do we have something similar where a precedent was established?" AR 1296; AR 2303-04; AR 9832-33; AR 10900-01.

141. Victoria Velkoff, Chief of the American Community Survey Office at the U.S. Census Bureau, drafted the initial answer to this question on behalf of the Census Bureau. It stated in relevant part as follows:

> The Census Bureau follows a well-established process when adding or changing content on the census or ACS to ensure the data fulfill legal and regulatory requirements established by Congress. Adding a question or making a change to the Decennial Census or the ACS involves extensive testing, review, and evaluation. This process ensures the change is

> necessary and will produce quality, useful information for the nation.

AR 2303; *see* AR 7644, 10950. The draft answer then described the "formal process for making content changes" laid out by the Census Bureau and OMB. AR 2304; AR 9832; AR 7644; AR 10901. That description was consistent with other Census Bureau documents describing the process to add a question or change the content of the decennial census, which are discussed above. AR 3560; AR 3890-91; PX-271, at 4.

142. Michael Walsh, Deputy General Counsel of the Commerce Department, and Sahra Park-Su, then Senior Policy Advisor at the Commerce Department, removed all references to the "well-established process" for adding or changing content on the census, *see* Docket No. 494-2 ("Park-Su Dep.") at 142; Tr. 1006-14; AR 9190, 13023. The answer to Question Thirty-One, as revised by Walsh and Park-Su, read as follows:

> No new questions were added to the 2010 Decennial Census, so there is no recent precedent for considering a request to add questions to a decennial census. Consistent with longstanding practice for adding new questions to the ACS survey, the Census Bureau is working with relevant stakeholders to ensure that legal and regulatory requirements are fulfilled and that the question would produce quality, useful information for the nation. As you are aware, that process is ongoing. Upon its conclusion, you will have all of the relevant data at your disposal to make an informed decision about the pending request from the Department of Justice.

AR 9190, 13023.

143. The final version of the response to Question Thirty-One included in the original Administrative Record was further modified to read as follows:

> Because no new questions have been added to the Decennial Census (for nearly 20 years), the Census Bureau did not feed bound by past precedent when considering the Department of Justices' request. Rather, the Census Bureau is working with all relevant stakeholders to ensure that legal and regulatory requirements are filled and that questions will produce quality, useful information for the nation. As you are aware, that process is ongoing at your direction.

AR 1296 (errors in original).

144. Dr. Abowd did not receive, review, or approve any of these revisions to the response to Question Thirty-One. *See* Tr. 1010-11. Nor were these revisions incorporated into Dr. Abowd's "control" copy of the responses. *See id.* To Dr. Abowd's knowledge, the response to Question Thirty-One is the only response that was changed between his final "control" copy and the copy that was submitted with the original Administrative Record. *See id.* at 1011.

c. Secretary Ross's Description of His Dealings with Nielsen

145. Third, Secretary Ross sought to bolster claims in his March 26, 2018 Memorandum by invoking his conversation with Christine Pierce, the Senior Vice President of Data Science for the Nielsen Company (US) LLC, *see* Ross Memo 3, 6, at AR 1315, 1318, but he materially mischaracterized the nature of that conversation.

146. Pierce testified by affidavit that Nielsen was contacted in the spring of 2018 about speaking with Secretary Ross regarding the census. *See* Docket No. 498-18 ("Pierce Aff."), ¶ 4. Despite multiple communications with Secretary Ross's staff, she was not advised in advance that the citizenship question was going to be a topic of the conversation. *See id.* ¶¶ 6, 8. Accordingly, she believed that the conversation would be about "the importance of the Census generally, the need for Nielsen and its commercial clients to have as complete and accurate a count as possible, and to advocate for full funding for Census operations." *Id.* ¶ 4.

147. On the evening of March 23, 2018, Pierce spoke by telephone with Secretary Ross and Walsh, the Commerce Department lawyer. *Id.* ¶ 7. As she testified, "it immediately became apparent that the citizenship question was the only topic of conversation." *Id.* ¶ 8.

148. During the conversation, Pierce told Secretary Ross "unequivocally" that she "was concerned that a citizenship question would negatively impact self-response rates," and she "explained that people are less likely to respond to a survey that contains sensitive questions." *Id.* ¶ 9. She "also added that increasing the length of a survey can reduce response rates" and "discussed the impact that lower response rates have on survey costs." *Id.* Finally, she "emphasized that Census non-response follow up operations are expensive because they require a full count and non-response follow up operations for the Decennial Census include in-person data collection." *Id.*

149. None of that appeared in the Ross Memo, which was issued only three days later. Instead, the Ross Memo stated, first, that Pierce had "confirmed

that, to the best of [her] knowledge, no empirical data existed on the impact of a citizenship question on responses." Ross Memo 3, at AR 1315.

150. Pierce, however, testified that she "did not say" that. Pierce Aff. ¶ 10. She "discuss[ed] the importance of testing questions to understand any impacts to response . . . [,] explained that a lack of testing could lead to poor survey results," and "confirmed that [she] was not aware of any such test of a citizenship question by the Census Bureau." *Id.*

151. The Ross Memo also asserted that Nielsen had "stated that it had added questions from the ACS on sensitive topics such as place of birth and immigration status to certain short survey forms without any appreciable decrease in response rates." Ross Memo 3, at AR 1315; *see also id.* at 6, at AR 1318 ("Additional empirical evidence about the impact of sensitive questions on survey response rates came from the SVP of Data Science at Nielsen. When Nielsen added questions on place of birth and time of arrival in the United States (both of which were taken from the ACS) to a short survey, the response rate was not materially different than it had been before these two questions were added.").

152. Pierce, however, testified that she "did not state that Nielsen had added 'questions concerning immigration status to short survey forms without any appreciable decrease in response rates.'" Pierce Aff. ¶ 12. She did explain that Nielsen had asked "certain questions from the ACS in [its] surveys and of [its] panelists, including place of birth and year of entry to the United States" and that these questions "had not caused a significant decline in response rates." *Id.*

¶ 13. But she "stressed the importance of specifically testing changes to questionnaires and that Nielsen had done such testing" with respect to those sensitive questions. *Id.* And she "did not suggest that Secretary Ross could draw parallels between the surveys conducted by Nielsen and the Decennial Census," as the two are "entirely different." *Id.* ¶¶ 13-14. Among other things, "Nielsen surveys are not conducted by a government agency and are not required by law"; their purpose is to "understand consumer purchases and media usage," not to count the population; they are "not required to count all people"; response rates "generally range" from only 5% to 40% and if someone does not participate Nielsen will simply "recruit" someone else to take his or her place; and, "unlike the Census, Nielsen provides incentives—usually cash—for filling out [its] surveys." *Id.* ¶ 14.

153. There is no indication in the Administrative Record (or elsewhere in the trial record) that Secretary Ross communicated with anyone at Nielsen other than Pierce. Further, Pierce is not aware of any other relevant communications between Nielsen and the Department of Commerce regarding the citizenship question. *Id.* ¶ 15.

154. The Court credits Pierce's account of the March 23, 2018 conversation with Secretary Ross. Indeed, Defendants chose not to even cross-examine her (and did not cite her testimony even once in their extensive post-trial briefing).

d. Comstock's Testimony About the Census Bureau's Analyses

155. Finally, the Court finds that Comstock's testimony in this matter about his and Secretary Ross's dealings with the Census Bureau in the period leading up to the Ross Memo was materially misleading. Notably, by his own account, Comstock was more "involved in the citizenship question" than anyone else at the Commerce Department between early 2017 and the issuance of the Ross Memo. Comstock Dep. 340-41. That characterization is borne out by the evidence in the Administrative Record and the trial record.

156. During his videotaped deposition, Comstock was asked about the statement in Dr. Abowd's January 19 Memo that adding a citizenship question to the census would be "very costly, harm[] the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources." January 19 Memo, at AR 1277; *see* Comstock Dep. 309-12. Comstock acknowledged the statement, but he testified that it "overstate[d] the case they made further in the document" and that it was "not an accurate representation of what's actually reflected in the document." Comstock Dep. 312.

157. Additionally, he testified that the statement was not "the final conclusion" or "the position" of the Census Bureau, *id.* at 312-13; that in a meeting with Dr. Abowd and others (presumably the February 12, 2018 meeting), "they stood by the entire analysis," but "not necessarily that statement," *id.* at 314; that it was not his "understanding" that "that particular statement represent[ed] the view of the Census Bureau," *id.*; and that it was "not representative of the data that was

presented to us in the course of extensive discussions," but rather "an early statement that mischaracterize[d] the final conclusions that we understood," *id.* at 316-17.

158. Based on an assessment of Comstock's demeanor and a review of the other evidence in the record, the Court declines to credit that testimony. For one thing, the entirety of the January 19 Memo is consistent with, and supports, the statement that adding a citizenship question to the census would be "very costly, harm[] the quality of the census count, and would use substantially less accurate citizenship status data than are available from administrative sources." January 19 Memo at AR 1277-85.

159. For another, there is no indication anywhere else in the record that, in the February 12, 2018 meeting or otherwise, Dr. Abowd or his colleagues at the Census Bureau ever retreated from the statement. To the contrary, Dr. Abowd testified at trial (credibly) that he adhered to the statement and conclusions in the January 19 Memo. *See* Tr. 882-92, 922-23, 9[illegible]54, 958-59.

160. In fact, if anything, the Census Bureau's assessment of the harms and costs of adding a citizenship question only grew *more pessimistic* after the January 19 Memo. While the January 19 Memo conservatively estimated that adding the citizenship question would cause a 5.1% increase in the non-response rate of noncitizen households, AR 1280, the Census Bureau has since updated its estimate of that figure to 5.8%. *See* PX-162 ("Brown Memo"), at 38, 42. And while the January 19 Memo conservatively estimated that adding the citizenship question would increase the costs of the 2020 census by at least $27.5 million (a figure that did not even include anticipated increases in communications costs),

AR 1282, the Census Bureau's current best estimate is that it would cost $82.5 million more. *See* Tr. 952, 1249-50.[26]

161. During his deposition, Comstock also acknowledged his awareness of the Census Bureau's view (set forth in the March 1 Memo) that Alternative B (adding the citizenship question) "would result in poorer quality citizenship data" than Alternative C (using administrative records) "and still have all the cost and quality implications of Alternative B" outlined in the January 19 Memo. Comstock Dep. 320. When asked about that view, Comstock testified that "there was [an] iterative exchange in which the conclusions of the Census Bureau to staff and some of their assertions did not hold up under cross-examination." *Id.* at 321.

162. Once again, based on an assessment of Comstock's demeanor and a review of the other evidence in the record, the Court declines to credit that testimony.[27]

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[26] The trial transcript reads "$82.5 *billion*," not million, but that is obviously an error, as reference to the corresponding demonstrative exhibit (Defendants' Demonstrative Exhibit 15) makes clear. *See Jones v. Nat'l Am. Univ.*, No. 06-CV-5075 (KES), 2009 WL 949189, at *2 (D.S.D. Apr. 4, 2009) (noting that Fed. R. Civ. P. 60(a) and Fed. R. App. P. 10(e)(1) authorize a district court to correct a trial transcript where it is in error).

[27] The Court also questions Comstock's testimony that there were "[t]wo or three" meetings with representatives of the Census Bureau, the last of which was "somewhere in the vicinity of March 20th." Comstock Dep. 322-23. There is no evidence in the record of any such meetings. Further, Dr. Abowd testified that the February 12, 2018 meeting (which Comstock attended) was his one and only meeting with Secretary Ross, and that he could not recall a meeting with Comstock after March 1, 2018. Tr. 884, 991-92.

Among other things, there is no indication anywhere in the record that the conclusions and assertions set forth in the March 1 Memo "did not hold up" or that, "under cross-examination" or otherwise, the Census Bureau retreated from them. To the contrary, Dr. Abowd testified at trial (credibly) that he adhered to the conclusions in the March 1 Memo. *See* Tr. 966-76.

8. The Genesis of the DOJ Letter Was Kept from the Census Bureau

163. The revisions to the Question Thirty-One response were not the only thing about which Dr. Abowd and his colleagues at the Census Bureau were left in the dark. They were also never told that Secretary Ross had begun considering a citizenship question in early 2017.

164. Indeed, it was not until Secretary Ross's June 21, 2018 Memo and the subsequent disclosures in this litigation (some of which are now part of the Administrative Record and some of which are not) that Dr. Abowd and others at the Census Bureau learned that Secretary Ross had begun considering a citizenship question in early 2017; that, as part of that consideration, Secretary Ross communicated with Bannon and Kobach; that, as early as May 2017, Secretary Ross had expressed frustration about nothing having been done about his "months old request" to "include the citizenship question"; that the Commerce Department had initiated conversations with DOJ about requesting the citizenship question rather than the other way around; and that the Attorney General himself directed the technical experts at DOJ not to meet with the Census Bureau to discuss alternative options. *See* Tr. 964, 1016-21.

165. Of course, Secretary Ross and his aides were not *required* to inform Dr. Abowd or others at the Census Bureau that they were considering whether to add a citizenship question to the census. As a *de facto* matter, however, the degree to which the origins of the decision were kept from those who worked hard to promptly evaluate DOJ's request was unusual and noteworthy. Moreover, had Secretary Ross and his aides involved the Census Bureau earlier, the experts there might have been able to conduct appropriate testing of the question in the context of the census itself. Indeed, by not revealing his consideration of the citizenship question before December 2017, Secretary Ross prevented those experts from conducting a study to quantify whether and to what extent the question would result in a differential undercount even with NRFU operations. *See* Tr. 1291, 1301.

166. A poignant exchange between counsel and Dr. Abowd at trial highlights the unusual—and impactful—nature of Secretary Ross's failure to consult the Census Bureau earlier. When asked whether he had been under the impression that all his work in the wake of DOJ's request "mattered as far as the Secretary's decision-making process," Dr. Abowd responded: "I was under the impression that it mattered in the conduct of the 2020 census, yes." Tr. 1021. Counsel then asked: "And no one ever told you during that entire period of time that Commerce Department officials had initiated this entire process, correct?" Dr. Abowd then answered: "No one told me that, but I am still under the impression it matters for the 2020 census." *Id.* at 1022. As he did so, Dr. Abowd choked up and visibly held back tears.

9. Findings Regarding the Timing of, and Reasons for, Secretary Ross's Decision

167. It is hard, if not impossible, to identify with precision when Secretary Ross first made the decision to add a citizenship question to the 2020 census—particularly in the absence of a deposition of Secretary Ross himself. But based on the foregoing record, the Court finds—by well more than a preponderance of the evidence—that Secretary Ross had made the decision months *before* DOJ sent its letter on December 12, 2017.

168. That conclusion is supported by evidence in the Administrative Record alone. First and most obviously, it is supported by Secretary Ross's May 2, 2017 email to Comstock expressing "mystif[ication]" as to why "nothing" had been done "in response to" his "*months old request* that we include the citizenship question," AR 3710 (emphasis added), and Comstock's reply later the same day that "we will get that in place" and "[w]e need to work with Justice to get them to request that citizenship be added back as a census question," *id.*[28] On its face, Secretary Ross's email supports the conclusion that he had made the decision to "include" the question before May 2, 2017—and thus before receiving DOJ's request on December 12, 2017. After all,

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[28] Comstock's email also stated that he had "the court cases to illustrate that DoJ has a legitimate need for the question to be included." *Id.* But there is no indication in the Administrative Record that he had communicated with anyone at DOJ about the issue prior to that date. *See also* Comstock Dep. 157 (confirming that he had not discussed the citizenship question with DOJ prior to May 2, 2017). Thus, he had no basis to opine on DOJ's "need for the question," let alone on whether such a need would be "legitimate."

his reference was not to a "months old" request to *analyze* inclusion of the question, but to his request, from a supervisor to his staff, to "include" it.

169. Second, the conclusion that Secretary Ross actually made the decision before DOJ sent its letter in December 2017 is further supported by Comstock's August 11, 2017 email to Secretary Ross emphasizing the "need to be diligent in preparing the administrative record" because the "issue will go to the Supreme Court." AR 12476. Plaintiffs characterize that email as evidence that "Secretary Ross and his senior staff agreed . . . to whitewash the administrative record." Plaintiffs' Joint Proposed Post-Trial Conclusions of Law, Docket No. 545-1 ("Pls.' Proposed Conclusions"), ¶ 354. The parsimonious nature of the initial Administrative Record in these cases, and the steps that Secretary Ross and his aides took to downplay, if not conceal, the significance of his decision, do provide some basis to draw such an uncharitable inference. But there is no need to do so in light of a more obvious and significant inference to be drawn from Comstock's email. That is, the email makes clear that, by August 11, 2017, Secretary Ross had already decided to add the citizenship question to the 2020 census. After all, the only reason to believe that "the issue" would definitely "go to the Supreme Court" was if Secretary Ross had decided to add the question; if there was a chance that Secretary Ross, after considering the issue with an open mind, was going to preserve the status quo, Comstock would have had no reason to state with confidence that the issue "will" go to the Supreme Court. Nor would there have been any reason to "prepar[e] the administrative record" to me-

morialize or justify a decision that might never even be made.

170. Third, the same conclusion is supported by Uthmeier's August 11, 2017 email to Comstock, which attached his legal memorandum concerning the citizenship question that was later used by AAAG Gore in drafting the Gary Letter. PX-607 (AR). In that email, Uthmeier stated that he had "some new ideas/recommendations on *execution*" and that "our hook" was that "[u]ltimately, we do not make decisions on how the data should be used for apportionment, that is for Congress (or possibly the President) to decide." PX-607 (AR) (emphasis added). As with Comstock, Uthmeier's choice of words makes sense only if he understood that there was already a decision to "execut[e]." Taken together, therefore, the record evidence reveals an agency staff in search of a rationale for a decision their boss had already made, before December 12, 2017.

171. More broadly, the Court's conclusion is supported by the general chronology leading up to the decision, as revealed by evidence in the supplemented Administrative Record. That evidence makes clear that Secretary Ross and his staff did more than merely "inquire[] whether the [DOJ] would support, *and if so would request*, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act," AR 1321 (emphasis added)—although that alone would have been significant. Instead, the evidence reveals that Secretary Ross was aggressively pressing to add a citizenship question to the census before the idea of justifying it on the basis of VRA enforcement was first floated, AR 3702, 3710; that,

prompted by Neuman, Secretary Ross's own aides came up with the legal rationale DOJ could rely upon for addition of the question, PX-188 (AR), PX-565 (AR); that, believing they needed another agency to justify adding the question, they actively lobbied other agencies to make the request and, when that initially proved unsuccessful, explored whether they could do it themselves, AR 12755-56; that, undeterred by the lack of any interest from DOJ staff, Secretary Ross intervened directly with Attorney General Sessions in order to secure the request they believed they needed, AR 1321, 2528, 2636, 4004; and that Secretary Ross's aides then fed DOJ with the rationale for the request rather than vice-versa, AR 2461; PX-607 (AR).

172. Notably, all of this evidence is in the Administrative Record alone—not in Defendants' initial production, to be sure, but in the Administrative Record as stipulated by the parties. *See* Docket No. 523, at Joint Stip. ¶ 63. What little evidence remains "outside" the Administrative Record after the parties' stipulations, however, only strengthens the conclusion that Secretary Ross had made his decision even before DOJ's request. Most notably, Comstock—the aide more involved in Secretary Ross's early deliberations on the issue than any other—testified that the Secretary had made a "request" to add the citizenship question "sometime in the spring"—"[p]otentially" as early as March 10, 2017. Comstock Dep. 146; *see also id.* at 337 (conceding that the "initial impetus for putting the citizenship question on the 2020 census" was Secretary Ross,

not DOJ, and that, "shortly after he was confirmed," he "request[ed] the question be put on the census").[29]

173. Secretary Ross's actual reasons for his decision are even foggier than the precise timing of his decision. There is no writing of any kind—either in the Administrative Record or produced in discovery, either authored by Secretary Ross or by anyone else—that describes the reasons why Secretary Ross wanted to add a citizenship question within weeks of his confirmation as Secretary. *See* AR 1-13024. Moreover, Comstock testified that Secretary Ross never disclosed why he wanted to add a citizenship question to the census—*and* that Comstock never asked him, perhaps because Comstock believed that the reason might or might not be "legally valid." Comstock Dep. 267; *see id.* at 112, 171-72, 251-55, 340-41. Teramoto, Secretary Ross's own Chief of Staff, similarly testified that

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[29] At trial, Dr. Abowd testified that he did not believe that Secretary Ross had "already made up his mind" about adding a citizenship question to the census when the two met on February 12, 2018. Tr. 1099-1100. The Court declines to rely on that testimony for several reasons. First, Dr. Abowd's testimony on this point is sheer speculation. He was obviously not privy to what was actually going on in Secretary Ross's mind, and he based his opinion entirely on the fact that the Secretary "asked a lot of questions." *See id.* Second, Dr. Abowd was not privy to the voluminous evidence that has emerged in this litigation, and is described in this Opinion, demonstrating that Secretary Ross's mind was made up well before February 2018. *See id.* at 1019-22. Finally, Secretary Ross was well aware of the fact that his decision was likely to be challenged in court (if not in Congress), *see* AR 12476, and—as discussed below—he took various steps to paint his decision in the best possible light and to make it appear as if it was a good faith response to DOJ's request; thus, it would have been surprising had he revealed, in word or deed, that he had already made up his mind.

she had no knowledge of why Secretary Ross wanted to add a citizenship question. Teramoto Dep. 32.

174. While the Court is unable to determine—based on the existing record, at least—what Secretary Ross's real reasons for adding the citizenship question were, it does find, by a preponderance of the evidence, that promoting enforcement of the VRA was *not* his real reason for the decision. Instead, the Court finds that the VRA was a *post hoc* rationale for a decision that Secretary had already made for other reasons.

175. Once again, that conclusion finds support in the Administrative Record alone. For one thing, it finds support in the very same evidence that supported the conclusion that Secretary Ross committed to adding the citizenship question months before he even received the request from DOJ. By definition, Secretary Ross's original and actual rationale could not have been promotion of better VRA enforcement because the record reveals that he had made up his mind well before DOJ even agreed to submit the request to him.

176. Moreover, it finds support in the sheer number of Commerce Department communications predating the DOJ letter—with staff, with Kobach, and with DOJ and DHS—none of which mention the VRA rationale, but all of which reflect Secretary Ross's anxious desire to add a citizenship question to the census. *See, e.g.*, AR 763-64, 2424, 2458, 2521, 3710, 3984, 4004. And it finds support in Comstock's aggressive—and initially unsuccessful—efforts to lobby DOJ and DHS officials with no responsibility for VRA enforcement. *See* AR 2458, 2462; PX-298(R), at RFA 73, 91-95. Those efforts make clear that the goal of Secretary Ross and his aides was to launder their request through another

agency—that is, to obtain cover for a decision that they had already made—and that the reasons underlying any request from another agency were secondary, if not irrelevant.

177. Once again as well, extra-record evidence merely strengthens the conclusion that Secretary Ross's actual rationale was something other than VRA enforcement—and that a belief that he needed another agency to request the question, rather than a belief that adding a citizenship question was necessary to enhance VRA enforcement, motivated his aggressive efforts to stimulate a request from DOJ.

178. First, notwithstanding his otherwise self-serving testimony, Comstock conceded in his deposition testimony that he did not believe that Secretary Ross's unstated reasons to add a citizenship question in early 2017 would "clear [the] legal thresholds" set by OMB and federal law. Comstock Dep. 153-54. Indeed, he admitted that he viewed his job as finding a "legal rationale" to support the Secretary's request (and then finding an agency to make the ask) and that he did not "need to know what" the Secretary's actual "rationale might be, because it may or may not be one that is . . . legally-valid." *Id.* at 181, 267. That testimony constitutes a near-confession that the VRA rationale was a *post hoc* concoction to justify a decision made for other reasons—that is, that Comstock felt the need to launder the request through another agency.

179. Second, there is reason to doubt that *DOJ itself* believed the VRA rationale in the Gary Letter. The VRA was enacted in 1965, fifteen years after a citizenship question last appeared on the decennial census questionnaire for all households. Yet, until Secretary

Ross and his senior aides planted the seed, DOJ had never before cited a VRA-related need for citizenship data from the decennial census; never before asserted that it had failed to bring or win a VRA case because of the absence of such data; and never before claimed that it had been hampered in any way by relying on citizenship estimates obtained from sample surveys. After fifty-four years of VRA enforcement, it was the Department of Commerce that first proposed the idea. In fact, DOJ did not even take the bait when Comstock first approached staff with the idea. It was not until Secretary Ross intervened directly with Attorney General Sessions that DOJ agreed to carry the baton forward based on the rationale that Secretary Ross's aides had come up with.

180. Additionally, AAAG Gore, the actual author of the Gary Letter, acknowledged that none of the DOJ components with principal responsibility for enforcing the VRA requested the addition of a citizenship question; instead, he drafted the letter solely in response to the Secretary's request. Gore Dep. 64-67, 94-95. He also testified that he drafted the letter without knowing if citizenship data based on responses to a citizenship question on the census would have smaller or larger margins of error, or would be any more precise, than the existing citizenship data on which DOJ currently relies. *See id.* at 225-28.

181. Beyond that, the odd nature of DOJ's request and events thereafter suggest that the goal was not to obtain better CVAP data for purposes of VRA enforcement, but merely to provide cover for Secretary Ross's decision to add a citizenship question. It would have been one thing for DOJ to ask the Commerce Depart-

ment for better CVAP data and leave it to the Commerce Department, which is ultimately tasked with deciding how to obtain needed data, to figure out how best to meet that need. But DOJ went further and, going beyond its role, explicitly asked the Commerce Department to add the citizenship question to the census.

182. Of course, there is no mystery why DOJ did so. By Secretary Ross's own admission, the Department of Commerce did not merely ask DOJ if existing data was adequate; instead, making clear that he had prejudged the solution to a problem that DOJ might or might not even have, he and his staff affirmatively asked DOJ if it "would support, and if so would request, *inclusion of a citizenship question*." June 21 Supplemental Memo (emphasis added). And, despite the DOJ staff's own lack of interest, Attorney General Sessions was only happy to oblige. As his aide put it to Teramoto: "[W]e can do whatever you all need us to do. . . . The AG is eager to assist." AR 2651.

183. Further, when the Census Bureau sought to meet with representatives of DOJ to discuss other, less harmful ways of meeting its need for data, Attorney General Sessions vetoed any such meeting. Had DOJ's interest genuinely been to get better CVAP data, rather than providing a *post hoc* rationale for Secretary Ross's resolve to add a citizenship question to the census, there is no explanation for that decision.

184. Finally, the Court's conclusion is supported by the sheer number of ways in which Secretary Ross and his aides tried to avoid disclosure of, if not conceal, the real timing and the real reasons for the decision to add the citizenship question. Those include:

- The curated and highly sanitized nature of the Administrative Record initially filed by Defendants in this matter, *see* Docket No. 193, at 1; July 3 Tr. 80-82, which (general background materials aside) omitted all materials relating to the deliberations and communications of Secretary Ross and his aides prior to the Gary Letter (despite Comstock's and Secretary Ross's acknowledgment as early as August 2017 of the need to be "diligent in preparing the administrative record," AR 12476);
- The lack of any record (even reconstructed) of various important steps along the way (despite, again, the stated intent to be diligent in preparing the administrative record), including but not limited to Secretary Ross's early discussions with other officials regarding addition of the citizenship question, *see* PX-302, at 2-3; Comstock Dep. 112; the September 6, 2017 meeting of Secretary Ross and his aides, *see* AR 1411-12, 1996-97; Comstock Dep. 221; Teramoto Dep. 58-61; Kelley Dep. 105-07; Secretary Ross's conversations with Attorney General Sessions that prompted DOJ to agree to request the question, Gore Dep. 83; and Secretary Ross's February 12, 2018 meeting with Dr. Abowd and others from the Census Bureau—his one and only meeting with the technical experts at the Census Bureau, *see* AR 9450;
- The failure to disclose to subject matter experts at the Census Bureau that the issue was on the table prior to the Gary Letter, a failure that pre-

vented those experts from conducting rigorous testing of the proposed question, Tr. 1018-22;

- The revisions to the Census Bureau's answer to Question Thirty-One, which were plainly intended to downplay the degree to which Secretary Ross departed from the process ordinarily used to consider new questions on the census, Tr. 965, 1010-11;
- The misleading, if not false, statements in the Ross Memo, including but not limited to its suggestion that Secretary Ross began considering the issue only after receiving the Gary Letter in December 2017, AR 1321, and the descriptions of the communications with Nielsen, *compare* Ross Memo 3, 6, at AR 1315, 1318, *with* Pierce Aff. ¶¶ 9, 10, 12-14;
- Secretary Ross's "admittedly imprecise," Petition for a Writ of Mandamus at 20, *In re U.S. Dep't of Commerce*, (Oct. 29, 2018) (No. 18-557), 2018 WL 5617904, at *24, if not false, testimony before Congress, including but not limited to his statements that he was "not aware of any" discussions with "anyone in the White House" (despite his own conversation with Bannon), that DOJ "initiated the request for inclusion of the citizenship question" (despite the fact that it was plainly initiated by the Commerce Department), and that he was responding "solely" to DOJ's request (despite the fact that it was he who had generated that request in the first place), *see* Recitation of Facts ¶¶ 70, 72, 98-102; and

- Comstock's misleading, if not false, testimony regarding the Census Bureau's analyses in this litigation, *see* Comstock Dep. 305-25.

Those acts and statements are not the transparent acts and statements one would expect from government officials who have decided, for *bona fide* and defensible reasons, to change policy. Nor are they the acts and statements of government officials who are merely trying to cut through red tape. Instead, they are the acts and statements of officials with something to hide.

STANDING

The Court begins its legal analysis, as it must, with the threshold question of whether any Plaintiff has standing to bring the claims asserted. Defendants contend, as they have throughout this litigation, that the Court lacks subject-matter jurisdiction because Plaintiffs cannot prove—and, after trial, have not proved—that they have suffered, or will suffer, injury in fact that is fairly traceable to Secretary Ross's decision to add a citizenship question on the 2020 census. *See* Defs.' Post-Trial Br. 8-44, 66-72. Notably, although they filed over fourteen applications seeking to avoid trial, Defendants now concede that trial was necessary to resolve the issue of standing. *See* Tr. 1421-22.[30]

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[30] In particular, Defendants conceded at oral argument that the Court could consider extra-record evidence in deciding whether Plaintiffs have Article III standing. *See* Tr. 1502; *see also id.* at 1422. Defendants continue to argue that Plaintiffs cannot show traceability as a matter of law—an argument the Court addresses in detail below—but they acknowledged at oral argument that the Court rejected that argument in its ruling on their motions to dismiss and that that ruling is law of the case. *See id.* at 1501-04. The net effect of these concessions is that trial was not only appro-

Further, they concede that the Court may, and indeed should, look at evidence beyond the Administrative Record to make findings of fact relevant to the standing inquiry. *See id.* To avoid any confusion, the Court sets forth those findings separately in the discussion that follows. And for reasons the Court will explain, those findings compel the conclusion that Plaintiffs do indeed have standing to assert their claims.

A. General Legal Standards

Article III of the United States Constitution extends the "judicial Power" of the United States to "Cases" and "Controversies." U.S. Const. art. III, § 2. This means that all suits filed in federal court must be "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 102 (1998). Courts implement this limit on the judicial power by ensuring that at least one plaintiff in any federal case has "standing." *See Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006) (noting that, in a case with "numerous" plaintiffs, "the presence of one [plaintiff] with standing is sufficient to satisfy Article III's case-or-controversy requirement"); *accord Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). Standing, in turn, is measured by a "familiar three-part test," which requires a plaintiff to show (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) (internal

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priate, but necessary on Defendants' own view of the case, making their repeated efforts to forestall trial particularly puzzling. *See also New York*, 2018 WL 6060304, at *3.

quotation marks omitted); *accord Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The plaintiff must make this showing "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Ultimately, the facts "(if controverted) must be supported adequately by the evidence adduced at trial." *Id.* (internal quotation marks omitted).

Injury in fact is the "first and foremost of standing's three elements." *Spokeo*, 136 S. Ct. at 1547 (internal quotation marks and alterations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 1548 (internal quotation marks omitted). An injury "need not be actualized" to satisfy Article III. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). A "future injury" can suffice, so long as it is "certainly impending, *or* there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Dreihaus*, 573 U.S. 149, 157 (2014) (emphasis added) (internal quotation marks omitted); *see also Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013) (noting that plaintiffs need not "demonstrate that it is literally certain that the harms they identify will come about").[31] Thus, for example, in a previous challenge to the conduct of the decennial

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[31] Although earlier in this litigation Defendants contended that the "substantial risk" formulation applies only in food-and-drug cases, *see* Docket No. 190, at 4-5, they conceded at oral argument that the standard applies more broadly and is good law, *see* Tr. 1485.

census, the Supreme Court found that the plaintiffs had established standing "on the basis of the expected effects" of the challenged conduct "on intrastate redistricting"—in particular, based on a factual finding that certain jurisdictions were "*substantially likely* . . . [to] suffer vote dilution in state and local elections." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 332-33 (1999) (emphasis added) (internal quotation marks omitted). Ultimately, the injury-in-fact requirement is meant to "ensure that the plaintiff has a personal stake in the outcome of the controversy." *Susan B. Anthony List*, 573 U.S. at 158 (internal quotation marks omitted).

Standing's second element requires proof that the plaintiff's injury is "fairly traceable" to the defendant's challenged conduct. Put differently, "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (alterations and internal quotation marks omitted). Significantly, though, "[p]roximate causation is *not* a requirement of Article III standing, which requires only that the plaintiff's injury be *fairly traceable* to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014) (emphases added); *see also Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013) ("[T]he 'fairly traceable' standard is lower than that of proximate cause."). That "requires no more than *de facto* causality." *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir. 1986) (Scalia, J.). Relatedly, for an injury to be "fairly traceable" to a defendant's conduct, that conduct need not be "the very last step in the

chain of causation." *Bennett v. Spear*, 520 U.S. 154, 169 (1997). To be sure, traceability may be "substantially more difficult to establish" where it depends on a lengthier causal chain, including intervening actions by third parties, but it "is not precluded" in such circumstances. *Lujan*, 504 U.S. at 562. As the Supreme Court has explained, even where "standing depends on the unfettered choices made by independent actors not before the courts," choices that "the courts cannot presume either to control or to predict," the traceability requirement is nonetheless satisfied if the plaintiff "adduce[s] facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.*; *see also Bennett*, 520 U.S. at 169 (holding that where the defendant's conduct has a "determinative or coercive effect upon the action of someone else" the traceability requirement is satisfied).

Third and finally, a plaintiff's injury must be "redressable" by the relief sought—that is, "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). Although "the 'fairly traceable' and 'redressability' components of the constitutional standing inquiry were initially articulated" as "'two facets of a single causation requirement,'" there is a difference between them: "[T]he former examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the latter examines the causal connection between the alleged injury and the judicial relief requested." *Allen v. Wright*, 468 U.S. 737, 753 n.19 (1984) (quoting C. WRIGHT, LAW OF FEDERAL COURTS § 13, at 68 n.43 (4th ed. 1983)). "[T]he very essence of

the redressability requirement" is that a request for "[r]elief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co.*, 523 U.S. at 107. But if there is "a likelihood that the requested relief will redress the [plaintiff's] injury," the requirement is satisfied. *Id.* at 103; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185-86 (2000) ("[F]or a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress.").

The Supreme Court's decision in *Davis* illustrates how these three requirements should be applied in cases that allege, at least in part, prospective risks of harm. In *Davis*, a candidate for the House of Representatives challenged Section 319(a) of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81, 109-11 (2002) (codified at 52 U.S.C. § 30117), which increased campaign contribution limits for any candidate whose opponent's personal campaign expenditures exceeded her own by a certain amount. *See Davis*, 554 U.S. at 729. The Federal Election Commission argued that Davis lacked standing to challenge the provision for two reasons: first, when he filed the lawsuit, his personal expenditures had not yet triggered the heightened contribution limits for his opponent; and second, once his expenditures did trigger the heightened limits (after the lawsuit was filed), Davis's opponent chose not to take advantage of them. *See id.* at 734. The Court swiftly rejected those arguments in an opinion by Justice Alito that was joined in relevant part by every member of the Court. *See id.* at 752 n.4 (Stevens, J., dissenting). The standing

inquiry, Justice Alito explained, is "focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed." *Id.* at 734. At that time, Davis "had declared his candidacy and his intent to spend more" than the relevant threshold, and "there was no indication that his opponent would forego" the benefits of Davis' choice—namely, the heightened contribution limits. *Id.* Moreover, the record "indicated that most candidates who had the opportunity to receive expanded contributions had done so." *Id.* at 735. "In these circumstances," the Court concluded, "Davis faced the requisite injury from § 319(a) when he filed suit." *Id.*

Davis yields three insights relevant here. First, it establishes that, in regulating the federal courts' power to dispense prospective relief, Article III is concerned with the *risk* of future injury, rather than its ultimate realization. After all, the Court found that Davis had standing even though the harm he feared never materialized. Second, the opinion makes plain that the risk of future injury may satisfy Article III's injury and causation requirements even if several steps on the causal chain still stand between a defendant's conduct and the plaintiff's injury when the case is filed. Davis, for example, was at least three steps away from suffering any concrete harm: He had to spend a sufficient amount of his own money; his opponent had to refrain from a comparable level of self-funding, *see id.* at 729 & n.5 (explaining that the heightened contribution limits were triggered when "a statistic that compares the expenditure of personal funds by competing candidates" reached a particular level); *and* his opponent had to then take advantage of the law by accepting heightened contributions. Even so, the Court found that Davis faced "a

real, immediate, and direct injury . . . when he filed suit." *Id.* at 734. Third, and related, *Davis* underscores that, under longstanding precedent, a party can establish standing to challenge government action even where its theory of injury depends on "choices made by independent actors not before the courts," so long as—through statistical analysis, common sense, or record evidence—the court can "predict" that those independent actors will respond to the government action in a way that causes the injury. *Lujan*, 504 U.S. at 562 (internal quotation marks omitted). In *Davis*, the plaintiff's theory of injury depended on the assumption that his opponent would be sufficiently incentivized to take advantage of the heightened contribution limits, once triggered. The Court deemed that assumption valid based on little more than evidence that "*most* candidates who had the opportunity to receive expanded contributions had done so." *Id.* at 735 (emphasis added). Notably, the Court did not require proof that the government conduct had a coercive effect on the third party's action; evidence that allowed the Court to predict how the third party would likely act in response to the government action was sufficient. *See id.*; *see also Lujan*, 504 U.S. at 562 (noting that, when injury depends on the conduct of third parties, it is sufficient to show "choices have been or *will be* made in such a manner as to produce causation and permit redressability" (emphasis added)); *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 104-05 (2d Cir. 2018) (finding "the agency's own pronouncements," as well as "[c]ommon sense and basic economics," supported a conclusion that an "increased penalty has the potential to affect [third parties'] business decisions and compliance approaches" in a manner that

would result in harm to the petitioners (internal quotation marks omitted)); *Texas v. United States*, 809 F.3d 134, 156 (5th Cir. 2015) (finding that Texas had established the necessary causal connection between the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program and a future injury because DAPA would have "enabled" third parties "to apply for driver's licenses" and there was "little doubt that many would do so"), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016).

B. Findings of Fact Related to Standing

As noted, the three elements of standing must be established "in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Accordingly, at this stage, standing must be supported by undisputed facts or by a preponderance of "the evidence adduced at trial." *Id.* (internal quotation marks omitted); *see* Defs.' Post-Trial Br. 67, ¶¶ 7, 9 (agreeing that the relevant standard is a preponderance of the evidence); Tr. 1477-78 (same). Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure and based on the extensive record compiled at trial, the Court therefore makes the following findings of fact with respect to Plaintiffs' standing. Although, as noted, "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement," *Rumsfeld*, 547 U.S. at 53 n.2, in the interest of making a comprehensive record so as to facilitate appellate review and avoid the need for remand, the Court makes

findings of fact—and, below, arrives at conclusions of law—with respect to most, if not all, Plaintiffs.[32]

1. Background

185. The goal of the census is to count everyone residing in the United States, but the census has never achieved that goal. *See* Census Bureau 30(b)(6) Dep. 254. In each census, some people are "counted twice" (referred to as "erroneous enumerations") and others are not counted at all (referred to as "omissions"). *Id.* When the number of omissions exceeds the number of erroneous enumerations, the final census tally undercounts the actual total population. This phenomenon is called a "net undercount." *See* Joint Stips. ¶ 25; *see also* Tr. 1366-67. Additionally, even when there is no net undercount of the total population, the census may still undercount certain groups of people relative to other groups. *See id.* This is called a "net *differential* undercount" of a particular group. *See* Joint Stips. ¶ 25.

186. The Census Bureau has identified certain "hard-to-count" groups that, historically, have proved especially difficult to count completely and accurately. Joint Stips. ¶ 21. Racial and ethnic minorities, immigrant populations, and non-English speakers have historically been among the hardest groups to count. *See id.* ¶ 22.

187. The Census Bureau has developed a range of strategies to reach such hard-to-count populations. *Id.* ¶ 26. The strategies include targeted marketing and outreach efforts, partnerships with community organizations, deployment of field staff to follow up with

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[32] To avoid confusion, the Court picks up the paragraph numbers from where the recitation of facts set forth above left off.

individuals who do not respond, and employment of staff with foreign language skills. *See id.* For example, in the 2000 and 2010 censuses, the Census Bureau used public advertising campaigns that included paid media in over a dozen languages to reach hard-to-count immigrant communities and to improve their responsiveness. *See id.* ¶ 27. The Census Bureau also partnered with local businesses, faith-based groups, community organizations, elected officials, and ethnic organizations to improve the accuracy of the count. *Id.* ¶ 28.

188. Despite these efforts, net differential undercounts have persisted for certain hard-to-count groups. In the 1990 census, for example, Hispanics were undercounted by almost five percent. *Id.* ¶ 23. The 2010 census similarly undercounted Hispanic and other populations; in total, it undercounted more than 1.5 million Hispanic and African-American people. *Id.* ¶ 24.[33]

2. The Citizenship Question Will Cause a Differential Decline in Self-Response Rates

189. The central pillar of the Census Bureau's efforts to count everyone—and the means through which the majority of people are counted, AR 172—is self-

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[33] The Census Bureau measures the accuracy of each census by conducting a post-enumeration survey in the summer of every decennial census year. *See* Tr. 400-01. The post-enumeration survey —known in 2010 as the "Census Coverage Measurement"— involves sending another group of enumerators to a subsample of about 180,000 American households to "conduct what amounts to another enumeration." *Id.* at 401. The survey produces a data set that allows the Census Bureau to measure the quality of the data produced by the decennial census enumeration. *See id.* at 401-02.

response to a questionnaire that the Census Bureau tries to send to every housing unit in the United States, *see* Joint Stips. ¶ 7. If there is net differential decline in self-response rates among a particular group (in other words, if the rate of self-response to the census questionnaire declines by a certain amount among a particular group, but not other groups) then that decline will, if left uncured, translate into a net differential undercount of that group (in other words, an undercount of that group that does not affect other groups).[34] Plaintiffs have proved that the addition of a citizenship question will cause precisely that outcome with respect to noncitizen and Hispanic households. Moreover, with respect to the net differential decline in self-response rates among noncitizen households, Plaintiffs have also proved the likely *amount* of the decline. With respect to Hispanic households, by contrast, Plaintiffs have managed to prove only that there will be such a decline; the evidence is not sufficient to quantify the decline.

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[34] When the Court says that the citizenship question will cause a "net differential decline" in self-response rates among noncitizen households, it is describing an incremental effect of the citizenship question that is unique to noncitizen households—that is, that the citizenship question will cause a decline in self-response rates among noncitizen households that will not occur among all other households. Similarly, when the Court says that such a decline will translate into a "net differential undercount" of people who live in noncitizen households, it is describing an incremental effect of the citizenship question that is unique to those people—that is, that people who live in noncitizen households will suffer an undercount that will not occur among other people.

190. The Court begins, as the census does, with self-response to the census questionnaire. The evidence in the trial record overwhelmingly supports the conclusion that the addition of a citizenship question to the 2020 census will cause a significant net differential decline in self-response rates among noncitizen households (that is, households with at least one noncitizen). Significantly, that is the Census Bureau's *own* considered view. *See, e.g.*, Brown Memo at 39, 54. Indeed, several persuasive Census Bureau analyses support this position, and no evidence in the record—from Defendants or otherwise—contradicts it. Defendants do attack the Census Bureau's own analyses in one respect, discussed below, but the proposition that addition of the citizenship question will cause a net differential decline in self-response rates among noncitizen households is otherwise undisputed.

191. The Census Bureau's conclusions are spelled out in three memoranda. First, the Census Bureau's December 22 Memo summarized evidence that a citizenship question would cause a then-estimated 5.1% decline in self-response rates among noncitizens. *See* December 22 Memo, at AR 11639-40. It noted that "this evidence is consistent with citizenship questions being more sensitive for household with noncitizens," *id.* at AR 11640, a fact that is not in dispute, *see* PX-297 at RFA 70.

192. Second, the Census Bureau's January 19 Memo similarly concluded that addition of a citizenship question would reduce self-response rates. *See* January 19 Memo, at AR 1280. The Memo summarized "[t]hree distinct analyses" that "support the conclusion of an adverse impact on self-response" caused by the addi-

tion of a citizenship question. *Id.* First, data show that, on the ACS survey, Hispanic households are disproportionately less likely to respond to the citizenship question, whether responding by mail or online. *Id.* Second, a comparison of self-response rates for the 2000 census's long-form census questionnaire (which included a citizenship question) and its short-form census questionnaire (which did not) revealed that noncitizen households were 3.3% less likely than all-citizen households to respond to the long-form questionnaire. *Id.* A similar comparison of 2010 census self-response rates to 2010 ACS self-response rates (the latter of which included a citizenship question) produced a similar result: Noncitizen households were 5.1% less likely than all-citizen households to respond to the survey containing a citizenship question. *See id.* Based on these comparisons, the Memo noted, it was a "reasonable inference that a question on citizenship would lead to some decline in overall self-response" and "a larger decline in self-response for noncitizen households." *Id.* at AR 1281. Finally, the Memo analyzed the "breakoff rates" (the rate at which a respondent stops responding to the survey when he or she comes to a particular question) on the 2016 ACS internet survey. Those rates indicated that Hispanics were disproportionately likely to "breakoff" in their responses when they came to the citizenship question. *See id.*

193. Third, a comprehensive study by Census Bureau staff published on August 6, 2018 and referred to at trial as the Brown Memo (so named for its lead author) consolidated the existing data on the impact of a citizenship question. The Brown Memo also concluded that a citizenship question would disproportionately reduce noncitizens' self-response rates. *See* Brown Memo

at 1, 54. The Brown Memo presented data illustrating that Hispanics and noncitizens are disproportionately unlikely to respond to a citizenship question. *See id.* at 7-9. The data also showed that those subpopulations became even less likely to respond to a citizenship question during the middle of this decade. *See id.* at 9-10 ("[T]hat sensitivity has increased in recent years.").

194. Whereas the January 19 Memo had predicted that addition of the citizenship question would cause a 5.1% differential decline in noncitizen household self-response rates, *see* January 19 Memo, at AR 1280, the Brown Memo updated that figure to 5.8% on the basis of more recent data, *see* Brown Memo at 39. Notably, it emphasized that the 5.8% estimate was still "conservative." *Id.*; *see also* Tr. 900-01. It was conservative, the Memo explained, because the analysis supporting the estimate relied on ACS data, and the effect of a citizenship question on the ACS may have been muted by its presence among the large number of questions. *See* Brown Memo at 39; *see also* Tr. 87, 89, 901-02. A citizenship question on the shorter 2020 census questionnaire "will be more visible" and thus likely to produce a more pronounced effect. Brown Memo at 39. And changes in the macroenvironment since the ACS data was collected, including a higher "level of concern about using citizenship data for enforcement purposes," could also exacerbate the effects of adding a citizenship question. *Id.*

195. Separate and apart from its effects on self-response rates among noncitizen households, the Brown Memo supports the conclusion that adding a citizenship question to the 2020 census will disproportionately depress self-response rates among Hispanic households

(some, but not all, of which are also noncitizen households). The Brown Memo showed that Hispanics were more than twice as likely as non-Hispanic whites to skip the citizenship question on the ACS and that the differential in such item nonresponse rates increased between 2013 and 2016. *Id.* at 8-10. Other ACS questions did not produce the same differential effects. *See id.* And the Memo found that the citizenship-question breakoff rate for Hispanics on the ACS was eight times higher than the breakoff rate for non-Hispanic whites. *See id.* at 10; *accord* January 19 Memo, at AR 1281.

196. As the Census Bureau has observed, this differential breakoff effect is growing. The breakoff rate among Hispanics for the 2017 ACS citizenship question (which was not available in time to be incorporated into the Brown Memo's analysis) was *twelve* times higher than the breakoff rate for non-Hispanic whites. *See* AR 12757-62; Tr. 916. Moreover, the breakoff rate for Hispanics, but not for non-Hispanic whites, increased between 2016 and 2017—suggesting that the effects of a citizenship question on Hispanic self-responses have been "increas[ing]." AR 12757-62; Tr. 916-17. The Census Bureau believes that "Hispanics are more sensitive to survey questions about citizenship than they were a few years ago"; non-Hispanic whites "are not." Census Bureau 30(b)(6) Dep. 366-69.

197. Defendants' expert, Dr. Abowd, credibly testified to the soundness of the Census Bureau's analyses and conclusion that adding a citizenship question to the 2020 census would result in a differential decline in self-response rates among noncitizen households. With regard to methodology, Dr. Abowd testified not only that the Brown Memo was "methodologically appropriate,"

but also that it "constitutes the best analysis that the Census Bureau can do of the consequences of adding the citizenship question to the 2020 census" given the available data. Tr. 897. With regard to conclusions, Dr. Abowd testified that both he and the Census Bureau agreed that adding a citizenship question to the 2020 census would lead to a lower self-response rate among noncitizen households. *See id.* at 881-82.[35] Finally, Dr. Abowd agreed that "[t]he bulk of the evidence suggests that the citizenship question is likely to be responsible for the decline in self-response," and that 5.8% was a "conservative estimate" of the likely differential decline in self-response rates among noncitizen households if a citizenship question were added to the 2020 census questionnaire. *Id.* at 1352, 900-02.

198. Dr. Abowd testified that considerations beyond those mentioned in the Brown Memo further supported the view that the 5.8% estimate was "conservative." *See id.* at 944. For instance, he referred to the Census Bureau's Census Barriers, Attitudes, and Motivators Survey ("CBAMS"). *See id.*; PX-662. The CBAMS found that, in 2018, only 67% of people said they were likely to respond to the 2020 census, as compared to the 86% who had said in 2008 they were likely to respond to the 2010 census. *See* PX-662, at 12. It noted that "[t]he citizenship question may be a major barrier" in part because people believed that the census's "purpose is to find undocumented immigrants." *Id.* at 43. Dr. Abowd testified that the increase in sensitivity to a

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[35] Dr. Abowd also agreed with the Census Bureau's conclusion, based on ACS data, that citizenship questions lead to greater breakoff rates among Hispanics than among non-Hispanic whites. *See* Tr. 910, 914-17.

citizenship question reflected in the CBAMS study "would not be captured in the 5.8 percentage point estimate that is based on data only up through 2016." Tr. 944-45; *see also id.* at 902, 916-17.

199. Testimony from at least three of Plaintiffs' expert witnesses bolsters the Census Bureau's and Dr. Abowd's conclusions about self-response rates. First, Dr. D. Sunshine Hillygus credibly and reliably testified that "noncitizens and Hispanics are differentially concerned about the confidentiality of a citizenship question" and, thus, "would be less likely to participate" in a survey that includes such a question. *See id.* at 50-51; *see also id.* at 57-58. She noted that this concern has increased in the last few years. *Id.* at 51-53. Notably, Dr. Hillygus testified that a citizenship question would be likely to affect the response rates of all Hispanics, "regardless of their own immigration or citizenship status." *Id.* at 51-52, 1404; *see also* PX-152; PX-662; PX-663. That testimony is supported by evidence showing that Hispanics who are citizens are disproportionately hesitant to engage with the government by seeking food stamps or health care out of fear that a family member could be deported. *See* Tr. 52-54, 57, 85-86.

200. Second, Dr. Matthew Barreto, "an expert in survey methodology, public opinion polling, and racial and ethnic politics," credibly testified that "the addition of a citizenship question . . . in today's macro environment would result in reduced participation in Latino and immigrant communities in 2020." *Id.* at 589, 620-21. He based this conclusion on a review of existing social science literature and on the results of a public opinion survey that he designed and conducted.

See id. at 620, 643-44. On the basis of that evidence, Dr. Barreto credibly concluded that Hispanic households would be substantially less willing to participate in the census if there were a citizenship question, regardless of whether they were given assurances that their responses would be kept confidential. Tr. 682-85; *see also* PX-670.[36]

201. Third, Dr. Jennifer L. Van Hook's expert analysis of 2017 ACS data demonstrates that nonresponse to the ACS citizenship question has continued to increase among Hispanics relative to other subgroups since 2013. *See* Docket No. 489-3 ("Van Hook Decl."), ¶¶ 69-71. By contrast, there has not been a significant increase in nonresponse rates for the citizenship question for other racial groups. *See id.* ¶ 70.

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[36] The Court puts only limited weight on Dr. Barreto's study. As Dr. Abowd pointed out, several considerations cast doubt on the results of the study. First, the study asked only about respondents' intentions to self-respond—as opposed to measuring actual behavior in the field. Second, the survey's response rate was only twenty-nine percent. And third, the resulting data set was not weighted to match population totals. *See* Tr. 1162-64; *see also id.* at 742. That said, as Dr. Abowd himself conceded, the study does provide some "additional evidence" to support the Census Bureau's own conclusion that "[t]he presence of a citizenship question on the 2020 census is likely to depress self-response rates, and the people who are not likely to self-respond are going to be more difficult to follow up." *Id.* at 1164. Moreover, as Dr. Abowd's testimony further confirmed, Defendants go too far when they maintain that Dr. Barreto's study could not provide "actionable information" because the only way to do so would be to run a true randomized controlled trial. Defs.' Post-Trial Br. 14, at ¶ 115. Indeed, the Census Bureau itself took a different view of what constituted "actionable information" for purposes of the 2020 census, declining to run a randomized controlled trial of its own and instead relying on its own internal, "natural experiment" analysis. *See infra* ¶ 240.

On an absolute basis, nonresponse rates for the citizenship question for Hispanics have also increased since 2013. *See id.* ¶¶ 72-73.[37]

202. Amazingly, despite all of the foregoing evidence —much of it from Defendants' own expert witness and the Census Bureau itself—Defendants contend that Plaintiffs failed to prove that addition of a citizenship question will cause these differential declines in self-response rates. *See* Defs.' Post-Trial Br. 8-16; *see, e.g.*, *id.* at 9-10, ¶¶ 94, 96. But that contention is without merit. First, it is based on a mischaracterization of the record evidence. For example, Defendants urge the Court to adopt a factual finding that, "[w]hile the balance of available evidence suggests that including a citizenship question on the 2020 Census *could* lead to a lower self-response rate in households that potentially contain a noncitizen, the magnitude of any such decline is unknown." *Id.* at 9, ¶ 93 (emphasis added and citation omitted). It goes without saying that the magnitude of any decline in self-response to the 2020 census questionnaire is, today, "unknown" (since the census has not yet occurred). But the weight of the evidence definitively shows the most that evidence about future events can ever show: a proba-

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[37] The Court relies on this portion of Dr. Van Hook's testimony, which it finds to be credible and reliable. But it declines to rely on any other portion of Dr. Van Hook's testimony because, as Defendants point out, other portions of that testimony included several significant errors that cast doubt on its reliability. *See* Defs.' Post-Trial Br. 11-14, ¶¶ 104-112; *see, e.g.*, Tr. 219-38. There is also reason to doubt the soundness of Dr. Van Hook's methodology because it involved extrapolating from Current Population Survey ("CPS") data and there are significant differences between the CPS and the decennial census. *See* Tr. 206-09.

ble range of "magnitudes," all illustrating the overwhelming likelihood that the "magnitude" of the differential decline in self-responses among noncitizens and Hispanics will be quite high—in the case of noncitizen households, conservatively estimated to be 5.8% or higher.

203. Second, Defendants' argument fails because it relies heavily on misguided criticism of the Census Bureau's own research. For instance, Defendants argue that the Brown Memo "cannot assign causation to the citizenship question" because it is merely a "natural experiment," as opposed to "a randomized control trial," and because it "did not, and to a certain extent could not" control for every confounding variable. Defs.' Post-Trial Br. 10, ¶ 96. But the Brown Memo *did* conceive of, and control for, numerous potentially confounding variables in its analysis of the citizenship question's effect on self-response rates. *See* Brown Memo at 74-77 (Tables A13-A14); Tr. 1151. As Dr. Abowd explained, for example, the factors controlled for in that analysis were the "groups of questions that . . . might plausibly be related to other sensitive questions for some subpopulation." Tr. 1150. That is, although it is true that no "natural experiment" could ever control for *all possible* confounding factors, this experiment *did* control for all *plausible* confounding factors associated with other questions on the ACS. *See id*; *see also id.* at 1150-55. And, although Defendants argue that the Brown analysis did not control for the sheer length of the ACS, *see* Defs.' Post-Trial Br. 10, ¶ 96, the Brown analysis largely did control for that factor by controlling for household size, "which has the biggest effect on the number of questions that you have to answer in the [ACS]." Tr. 1152.

204. Finally, Defendants suggest that the Brown Memo is incomplete because it "could not account for the changing macro environment" and that it could be that the macroenvironment, rather than the citizenship question, explained why noncitizen households responded to the ACS at lower rates than all-citizen households. *See* Defs.' Post-Trial Br. 10, ¶ 96. But, as Dr. Abowd explained, the macroenvironment is "constant" or "almost constant" across the groups. Tr. 1153. That means that even though the kind of natural experiments described in the Brown Memo "can't make . . . sophisticated controls for the macro environment," *id.*, any meaningful effects should be muted because the same macroenvironment affects all ACS respondents.

205. In sum, the trial evidence clearly shows, and certainly shows by a preponderance of the evidence, that the citizenship question will cause a significant differential decline in self-response rates among noncitizen households. Notably, even Defendants conceded at oral argument that there is "credible quantifiable evidence" that "the citizenship question could be expected to cause a decline in self-response." Tr. 1453.

206. More specifically, the Court finds that the addition of a citizenship question to the 2020 census will cause an incremental net differential decline in self-responses among noncitizen households of at least 5.8%. The Court further finds that that estimate is conservative and that the net differential decline could be much higher. Further, the evidence demonstrates, and the Court finds, that the citizenship question will also cause a significant decline in self-response rates among Hispanic households. Although it is harder to quantify the likely magnitude of that decline (or to isolate the

decline from the citizenship question's effects on self-response rates among noncitizen households) based on the record here, the evidence of a decline in self-response rates among Hispanic households supports the overall conclusion that the 5.8% estimate captures only part of the citizenship question's differential effects.

3. NRFU Operations Will Not Cure the Differential Drop in Self-Response Rates

207. The Court turns next to the Census Bureau's procedures (referred to as Non-Response Follow-Up, or NRFU) for attempting to make up for the large number of households that do not self-respond to the census questionnaire. If a known household fails to self-respond, it is shifted into the Census Bureau's NRFU workload. *See* Joint Stips. ¶ 8. NRFU includes a range of operations designed to obtain data about those households that do not volunteer the information themselves: in-person visits to households by "enumerators"; use of administrative records; collection of information from "proxies," such as neighbors or landlords; and "imputation," a process through which the Census Bureau extrapolates data about households from supposedly comparable household data. *See id.* ¶¶ 9-12; Tr. 33-34; *see also* 83 Fed. Reg. 26643, 26648-49 (June 8, 2018) (admitted as PX-655). NRFU efforts in prior censuses have involved all of these methods, with the exception of a new proposed use of administrative records at one step in the process. *See* Census Bureau 30(b)(6) Dep. 400-01. The evidence demonstrates that each of NRFU's steps will replicate or exacerbate the effects of the net differential decline in self-response rates among noncitizen households.

208. Even before the addition of the citizenship question, the Census Bureau had been anticipating a somewhat larger NRFU workload for the 2020 Census. Rates of self-response to Census Bureau surveys have been in general decline, "as people are overloaded with requests for information and [are] increasingly concerned about sharing information." AR 162, 172. With the addition of the citizenship question and the corresponding decline in self-response rates it will cause, however, the Census Bureau now expects a previously unanticipated increase in NRFU cases. *See* January 3 Memo, at AR 5474; Brown Memo at 43. That is, the decline in self-response rates caused by the citizenship question will force the Census Bureau to "try to enumerate more people through nonresponse follow-up efforts." Tr. 950-52; *see also* January 19 Memo, at AR 1279-82. Moreover, because the decline in self-response rates will be disproportionately greater among noncitizens and Hispanics, the Census Bureau expects an increased use of NRFU operations in an effort to enumerate a disproportionate number of noncitizen and Hispanic households. *See* Brown Memo at 42-43.

209. The resulting increase in NRFU workload will be enormous. The Census Bureau estimates that nearly ten percent of all households "potentially contain at least one noncitizen." Brown Memo at 42. Based on this, it estimates that the addition of a citizenship question will cause approximately 2,090,000 additional households (approximately 6.5 million additional people) to go into its NRFU procedures, because of the citizenship question's effects on self-response among noncitizen households alone. *See id.*

210. The Census Bureau strives to maximize self-response rates—rather than relying on the collection of data through NRFU operations—for two reasons. First, NRFU operations are more expensive than self-response, so maximizing self-response reduces the costs of administering the census. *See* Tr. 33. Second, the data collected through self-response is more accurate and complete than the data collected through NRFU operations. *See id.* at 33-35, 292, 325. Accordingly, the Census Bureau places a high priority on obtaining self-responses from as many households as possible. *See* AR 163, 165.

211. Significantly, NRFU has not remedied net undercounts in prior censuses. For example, in prior censuses, the net undercounts of Hispanics were estimated at 1.54% (2010), 0.71% (2000), and 4.99% (1990) even after NRFU procedures. *See* PX-267, at 18 (Table 7); *see also* Tr. 1364-65. As Dr. Hillygus testified, these translated into differential undercounts of Hispanics, as compared to non-Hispanic whites, of 2.38% (2010), 1.84% (2000), and 4.31% (1990). *See* Tr. 95-97.

212. Moreover, historical data show that substantial post-NRFU undercounts can manifest in specific locations, including at the neighborhood level. *See* Tr. 407, 412-14, 416, 452-53. The 2010 Census, for example, omitted approximately 65,000 people in minority neighborhoods of Brooklyn and Queens, despite NRFU efforts. *See id.* at 452-53. That 2010 undercount involved an erroneous enumeration (that is, an overcount) of 8.4% in non-Hispanic white neighborhoods and an omission (that is, undercount) of over 10% in high-minority neighborhoods of Brooklyn. *See id.* at 412-413, 414, 452-53. Thus, although there was no net

undercount in Brooklyn as a whole, the offsetting enumeration errors and NRFU failures yielded erroneous data at the neighborhood level. *See id.* at 412, 414.

213. The record shows that if a citizenship question is added to the 2020 census, NRFU procedures will fail to cure the resulting differential decline in self-response rates among noncitizen and Hispanic households. As the Court lays out in more detail below, each step of the NRFU process will fail to prevent such a decline from translating into a differential undercount of people who live in such households, and will likely even exacerbate the problem.

214. In the first place, the evidence shows that NRFU cannot—and does not even try to—fix undercounts caused by households leaving certain individual members off their questionnaire, a phenomenon that will be more common among noncitizen and Hispanic households. That is, when a household *does* self-respond, but omits one or more household members from its response, the Census Bureau simply assumes it has counted everyone at that address. NRFU does not even attempt to fix this problem, meaning that the uncounted household member will stay uncounted. *See* Tr. 1309-10; Census Bureau 30(b)(6) Dep. 459. This precise phenomenon has contributed to net undercounts of certain subpopulations in the past—including Hispanics. *Id.* at 1306; *see* Census Bureau 30(b)(6) Dep. 394. And indeed, the evidence shows that noncitizens and Hispanics are both disproportionately likely to be omitted from self-responses in this way, particularly if the citizenship question is added to the census. *See* Tr. 124-26; *see also id.* at 1308-10. Dr. Abowd testified that it is "fair" to say that NRFU

"would not meaningfully address" any undercount caused by this type of omission. *Id.* at 1326. In fact, because such households would count as having self-responded, they would never enter the NRFU workload, and, for that matter, would not even count toward the 5.8% decline in self-response. That is, the phenomenon of household roster omissions helps explain both why the 5.8% figure is conservative and why NRFU will fall short.

215. Second, even where NRFU does attempt to address the decline in self-responses among noncitizen households, it is at least as likely to fail at that task as the decline in self-response is likely to occur in the first place. This is because many of the reasons that the citizenship question will cause a decline in self-response also apply to NRFU, and will also make NRFU less effective at remedying that decline. For example, to the extent that the macroenvironment will magnify the effects of the citizenship question on self-response, it will also render NRFU operations less effective among the subpopulations that are less likely to self-respond. *See* Census Bureau 30(b)(6) Dep. 314-15; Tr. 96, 100. As Dr. Abowd testified, the Census Bureau has not tested the efficacy of NRFU operations in the presence of a citizenship question. Tr. 1303. Plaintiffs, on the other hand, introduced persuasive evidence that NRFU operations will not succeed in remedying the differential decline in self-response caused by the addition of the citizenship question because each successive step of the NRFU process will reinforce or exacerbate the differential undercount of noncitizens and Hispanics. As the Court discusses below, this will happen in four primary ways: (1) noncitizens and Hispanics who do not self-respond to the census because of the pres-

ence of a citizenship question are similarly unlikely to respond (or to give a complete response) to in-person NRFU enumerators; (2) in some cases, NRFU will enumerate non-self-responding households using administrative records that, while the most accurate source of citizenship information, still tend to undercount noncitizens; (3) to the extent NRFU relies on "proxy" responses from third parties, those proxies are disproportionately unlikely to give information about noncitizen and Hispanic households and likely to underestimate their size when they do; and (4) imputation will reinforce or exacerbate the net differential undercount because it will extrapolate data about uncounted households—including a disproportionate number of noncitizen and Hispanic households—from a data set in which noncitizens and Hispanics are disproportionately underrepresented.

216. To begin, NRFU's first step—an in-person visit from a NRFU enumerator—is likely to disproportionately undercount noncitizens and Hispanics. As the Census Bureau itself acknowledges, households that refuse to self-respond to the census questionnaire because of the presence of a citizenship question are "particularly likely to refuse to respond in NRFU as well." March 1 Memo, at AR 1311. The Census Bureau's specific analysis of the effect of the citizenship question on the NRFU process bears this out: That analysis concluded that "[h]ouseholds deciding not to self-respond because of the citizenship question are likely to refuse to cooperate with enumerators coming to their door." Brown Memo at 41; *see also id.* at 42 n.19; Census Bureau 30(b)(6) Dep. 425; Tr. 1336-37. Defendants' own expert, Dr. Abowd, testified that the same considerations leading such house-

holds not to self-respond are likely to lead them not to respond to NRFU in-person enumerators. Tr. 1312. And as the authors of the Brown Memo concluded, given this resistance to in-person enumerators, the undercount attributable to a citizenship question "may not be avoidable . . . by spending more money on fieldwork. Once a household decides not to cooperate, it may not be possible to obtain an accurate enumeration no matter how many times an enumerator knocks on their door." Brown Memo at 43 n.60. Based on the evidence, the Court finds that households that do not self-respond to the census questionnaire because of the citizenship question are similarly unlikely to respond to NRFU enumerators—or to give a complete and accurate accounting of the people who live in their households when they do. This step in NRFU will therefore only replicate the citizenship question's differential effects on self-response, thereby failing to counteract a differential undercount of people who live in noncitizen and Hispanic households.

217. The same will be true of what comes next for some households, after in-person NRFU attempts fail —the use of administrative records. After a NRFU enumerator's first visit to an address, if high-quality administrative records about that address are available, *see* AR 67 & n.4, the enumerator may consult those records to determine whether the address is vacant or should be deleted from the Master Address File or MAF, or even to enumerate the people who live there. *See* Tr. 1116, 1201-02, 1207-08; *see also* 83 Fed Reg. at 26649.[38] But the use of administrative records in

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[38] An address is marked as "vacant" if NRFU procedures (including, in 2020, both in-person visits and administrative records,

these ways will reinforce, rather than cure, the differential undercount of noncitizens and Hispanics.

218. First, although the evidence does not strongly suggest that it will disproportionately affect noncitizen or Hispanic households, using administrative records to mark addresses as vacant or for deletion from the MAF will negatively affect the quality of data obtained through NRFU procedures. When an address is marked as "vacant" or flagged for deletion from the MAF, it is "enumerated" as containing no people, and all further efforts to count people living there stop; no subsequent imputation is made to count people at that address. *See* Tr. 368. Put differently, "[i]mputation," the next step in NRFU, "is not required because you have essentially said there aren't any people there." *Id.* at 367. But, according to the Census Bureau's own limited studies, roughly twenty percent of addresses that administrative records suggest should be deleted or marked as vacant are actually occupied. *See id.* at 314; *see also id.* at 1199. Nor do the Census Bureau's future plans to address this error rate—which include adding an additional direct visit by an enumerator before marking an address "vacant" or "delete," *id.* at 1199-1200—solve the problem. As a preliminary matter, it is not clear that the Court can even consider that

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see Tr. 1117-18) indicate that the housing unit at that address is unoccupied. An address is marked as "delete" if NRFU procedures determine that it should be removed from the MAF altogether because it has been demolished, is nonresidential, or is deemed uninhabitable. *See* AR 67 & n.4. Once an address is marked as "vacant" or "delete," the Census Bureau mails it one final postcard encouraging self-response and then removes it from the NRFU workload, ending its attempts to enumerate any people living there. *See* 83 Fed. Reg. at 26649; Tr. 312.

possibility given that the parties' stipulations about NRFU procedures do not include such a step. *See* Joint Stips. ¶¶ 8-11. But it is not clear that the plans will reduce the error either. The Census Bureau has performed no testing of how effective the new procedures will be. *See* Tr. 1378-79. And when it attempted something similar in 2010—that is, sending an enumerator to independently verify the status of any housing unit identified as vacant—the process still remained error-prone. *See id.* at 351-53.

219. Thus, the Court finds that the process of marking as vacant or deleting addresses from the MAF will result in the misidentification of occupied addresses as vacant or "should be deleted." This will undermine NRFU's ability to correct for any decline in the self-response rate on the 2020 census. Additionally, the Court finds that these errors will be particularly large in the 2020 census because the addition of the citizenship question and consequent decline in the self-response rates among noncitizen and Hispanic households will push more of these households into the NRFU process, where the errors will manifest. Although there is no evidence in the record to suggest that the errors introduced at this step will aggravate or ameliorate any net undercount of noncitizens or Hispanics, they will be one more mechanism through which the citizenship question will degrade the quality of resulting census data, by causing more households to be enumerated through this process, rather than through more accurate self-responses.

220. Whether and how administrative records will be used to *enumerate* non-self-responding households in NRFU is uncertain, as the procedure has not yet

been approved by OMB, and the Census Bureau "hasn't made a decision yet about how it will process responses to the citizenship question alongside" those records. Tr. 1030. If administrative records are used for that purpose, however, they will reinforce the net undercount of people who live in noncitizen households and Hispanics. The Census Bureau has no data to show that using administrative records would cure a differential drop in self-response rates, Tr. 1340, and when asked whether there was evidence that "populations that are likely to see an increase in nonresponse due to the citizenship question can be successfully enumerated on a wide scale using administrative records," Dr. Abowd answered that "the administrative record actually shows that [the Census Bureau] concluded the opposite," *id.* Indeed, the evidence shows that, if the process is used, it will actually differentially undercount Hispanics and people who live in noncitizen households because the quality of administrative record data varies for different groups. *Id.* at 104. If such records are used, they will be used to enumerate only "a limited number of those households for which there is high quality administrative data about the household." Joint Stips. ¶ 9. Noncitizen and Hispanic households are less likely to be accurately represented in quality administrative records than other groups. *Id.* at 1340-41; Census Bureau 30(b)(6) Dep. 252-23, 389-91; Tr. 104. As a result, the Census Bureau expects that it will fail to link Hispanics to administrative records at a higher rate than non-Hispanic whites; that enumeration using administrative records will be less successful for noncitizens than for citizens; and that undocumented immigrants will be even harder to enumerate using administrative records because

they are less likely to appear in such records at all. *See* Tr. 1340-41; Census Bureau 30(b)(6) Dep. 389-91. Thus, although in a simple one-to-one comparison, the administrative records available to the Census Bureau are a more reliable source of accurate answers to questions about a person's citizenship status than survey questions, *see* AR 1285, the administrative records proposed to be used for this purpose would still tend to undercount people who live in noncitizen households. In any event, the Court declines to place much weight at all on a step that, Defendants admit, remains a hypothetical possibility rather than part of a finalized plan to address the effects of the citizenship question.

221. Third, the use of proxies at the next step of the NRFU process is also unlikely to cure the decline in self-response among noncitizens and Hispanic households. Indeed, as with other NFRU procedures, households that fail to self-respond because of the citizenship question will be relatively unlikely to be successfully enumerated through proxies. *See* Tr. 1342. For one thing, proxy responses are more likely to result in errors and omissions of household members than self-responses are, further degrading the quality of the resulting census data. *See* Census Bureau 30(b)(6) Dep. 382-83. For example, the Census Bureau's analysis of the 2010 Census found that proxy responses resulted in a correct enumeration only 70.2% of the time, as compared to 97.3% of the time for self-responding households. *See* January 19 Memo, at AR 1282 (citing PX-267 at 33, Table 21). For another, the Census Bureau has found that proxies generally "supply poor quality individual demographic and socioeconomic characteristic information about the person on behalf of whom they are responding." Brown Memo at 41, 42 (Table 12).

222. In fact, the evidence suggests that the use of proxies will reinforce or exacerbate the net differential undercount of people who live in noncitizen and Hispanic households attributable to the citizenship question. The record contains no evidence suggesting that households that fail to respond to the census because of a citizenship question will be enumerated through proxies as successfully as other non-responding households, Tr. 1342; to the contrary, the evidence suggests that households that fail to self-respond because of the citizenship question will be relatively unlikely to be successfully enumerated through proxies, even as compared to households that fail to self-respond for other reasons.

223. For instance, the Census Bureau's evidence shows that people who in areas with higher percentages of noncitizen households are less likely to give proxy responses than people in other areas are. *See* Census Bureau 30(b)(6) Dep. 386. In other words, people who live in communities with high rates of noncitizens are disproportionately less likely to provide information about their neighbors to the government. Moreover, when proxies do answer, they are less likely to provide accurate information than self-responders are. *See* January 19 Memo, at AR 1282; Brown Memo at 41. Some proxies give incorrect information because they "have less information about the household than a member of the household [does]." Tr. 107. As Dr. Hillygus testified, proxy responders are especially likely to underestimate the size of noncitizen and Hispanic households because they do not know the true size of the household due to complexities in living arrangements. *Id.* at 110-11; *see also id.* at 1397-1400. And some proxies give incorrect information because they have an incentive to do so. For example, land-

lords concerned about violating the law might intentionally underreport the number of occupants in a household or fail to report residents lacking legal status. *See id.* at 107-08, 336. And other proxies may choose not to reveal information for fear that it will cause negative consequences like deportation for their neighbors. *See id.* at 110-11; *see also id.* at 1398-1400. A preponderance of the evidence thus shows—and the Court finds—that the use of proxies in NRFU will systematically underestimate the size of noncitizen and Hispanic households.

224. Fourth, the final stage of the NRFU process —imputation—will also reinforce or exacerbate a differential undercount of people who live in noncitizen and Hispanic households. "Imputation" means, essentially, modeling or predicting information about the uncounted households based on the information already gathered from counted households. *See id.* at 1232, 1350-51. For the census, a household is "imputed" only if it remains uncounted after all the other NRFU steps. *See id.* at 1231, 1350. At that point, the Census Bureau imputes the number and characteristics of the people living in the household. *See id.* at 113-14. As practiced by the Census Bureau in NRFU operations, imputation has two components: "count imputation," which imputes the *size* of a household; and "whole-person imputation," which includes "count imputation" *and* imputation of all other characteristics to the people in the household. *See id.* at 113-14, 1193-94; January 19 Memo, at AR 1281. In each case, accurate imputation depends on an accurate starting point; "if there are errors in the data collected, those errors are then carried over into the imputation." Thompson Decl. ¶ 117; *see e.g.*, January 19 Memo, at AR 1282.

225. NRFU's imputation procedures will reinforce or exacerbate the net differential undercount of people who live in noncitizen and Hispanic households because the Census Bureau's imputation model incorrectly assumes that it is starting with accurate data. As Dr. Barreto credibly explained, when imputing characteristics from a group of counted (or "known") people to a group of unknown (or "missing") people, it matters whether the "missing" group is a random selection of the population or whether it is instead missing for a particular reason. *See* Tr. 702-03. If the "missingness" of a group is correlated with a particular characteristic, that will make it impossible to accurately impute characteristics from the known group to the missing group. *See id.* For example, if the group of "missing" households still uncounted after NRFU's first three steps is disproportionately composed of noncitizens and Hispanics compared to the known (*i.e.*, counted) households, then imputing the missing household characteristics from the known population (in which noncitizens and Hispanics are *under*represented) will not yield accurate data about the "missing" households (in which noncitizens and Hispanics are *over*represented). *See also id.* at 702-03, 1236-37.

226. That is precisely the problem here. For all the reasons explained above, when the Census Bureau performs its imputation calculations, noncitizen and Hispanics households will be underrepresented in the "counted" or "known" population and overrepresented in the "unknown" or "missing" population. *See id.* at 119, 1352-54, 1401; PX-400, at 3. Because the Census Bureau "do[es] imputation based on those self-responding . . . , enumerated households," and because self-response to the Census is correlated with citizenship status (that is,

citizens are more likely to self-respond to the census than noncitizens, as discussed above), the set of known households from which imputation proceeds will be disproportionately composed of all-citizen households. Tr. 1351-52; *see* Brown Memo at 44.[39] Noncitizen and Hispanic households are therefore more likely to be counted using imputation. But because that imputation will extrapolate their numbers from an unrepresentative sample (which undercounts them), that imputation will lead to an erroneous under-enumeration of people who live in both noncitizen and Hispanic households. The Census Bureau knows that its imputation model will be biased in this way. *See* Tr. 114-19, 1353-54.

227. Dr. Abowd acknowledged that imputation "disadvantages hard-to-count subpopulations" such as noncitizens and households containing noncitizens. *Id.* at 1384-85. And Census Bureau data suggest that, historically, increased rates of imputation lead to undercounts in the imputed population. *See* PX-267, at 16-17 & Table 9. Additionally, the Census Bureau has historically treated household size as an "ignorable" characteristic, one that can be safely assumed to occur randomly throughout both the known and unknown populations. *See* Tr. 113-17; *see, e.g.*, PX-478 at 5-7. But the available data show that household size is not an ignorable trait. Because Hispanic and noncitizen households tend to be larger than other households, and because such households are underrepresented in

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[39] In technical terms, this means the Census Bureau will use an "ignorable missing data model" to impute numbers and characteristics to unknown households even though the "missing data" are actually "*non*ignorable." Tr. 1236-40, 1351-52, 1401. When the Census Bureau does so, it "end[s] up with bias." *Id.* at 1401.

the known sample (and overrepresented in the "missing" group), imputing household size from the known sample to the missing group leads to an undercount of the missing group. *See* Tr. 115-21. Imputing missing household figures from data that already undercount noncitizens and Hispanics, as the Census Bureau plans to do, will only extrapolate that undercount into the imputed data.

228. The Census Bureau has not yet finalized its imputation algorithm for the 2020 Census. *See id.* at. 1351. Dr. Abowd testified that the Census Bureau has set up an "expert panel" empowered to modify the imputation algorithm "if they can figure out a way to do so successfully," but "no such modification has been proposed to date." *Id.* at 1353. And, speaking more generally, Dr. Abowd testified that the Census Bureau "[does not] plan to modify the NRFU operation to address the citizenship question." *Id.* at 1357.

229. For all of these reasons, NRFU operations will fail to prevent the net decline in self-response rates among noncitizen (and likely Hispanic) households from translating into a net differential undercount of people who live in such households—instead, it will reinforce or exacerbate that decline.

230. In the face of Plaintiffs' considerable evidence that NRFU will fail to remedy the differential decline in self-response among Hispanic and noncitizen households—or, worse, even exacerbate the decline—Defendants offer no evidence to support their claim that NRFU will be adequate to the task. And indeed, the available evidence supports exactly the opposite conclusion. Where specific subpopulations have self-responded at relatively lower rates before, NRFU has

failed to compensate for the difference, leading to net undercounts of those populations. As Plaintiffs' expert Dr. William P. O'Hare demonstrated based on his study of the last three censuses, for example, negative net differential self-response rates among demographic groups have reliably translated into net undercounts of those demographic groups *despite the Census Bureau's NRFU operations*. *See* Docket No. 507-1 ("Corr. O'Hare Aff."), ¶¶ 28-30, 38-39, 43-44. That is powerful evidence that NRFU is generally unable to prevent self-response declines from translating into net undercounts.

231. Dr. O'Hare opined further that declines in self-response rates *cause* net undercounts. *See id.* ¶¶ 47-55. In response, Defendants are quick to recite the old saw that correlation alone does not imply causation. *See* Defs.' Post-Trial Br. 16, ¶ 123. Dr. O'Hare recognized that, however, and was accordingly careful in his conclusions. And, as Dr. O'Hare correctly pointed out, a correlation of the strength and character that he described may be evidence of causation, even if it is incapable of establishing it beyond a reasonable doubt. *See* Corr. O'Hare Aff. ¶¶ 49-50.

232. The Court concludes just that: Dr. O'Hare's testimony provides affirmative evidence that self-response declines among specific subpopulations directly cause net undercounts of those subpopulations. For the purposes of this litigation, a preponderance of the evidence supports that conclusion. More importantly, however, Dr. O'Hare's testimony illustrates the historical inability of NRFU to *prevent* net undercounts of particular subpopulations in the presence of a decline in self-response rates.

233. Despite this evidence about the inadequacy of NRFU procedures, Defendants claim that NRFU efforts will be sufficient "to mitigate any decrease in the initial self-response rate." Defs.' Post-Trial Br. 16, ¶ 127. But Defendants offer no evidence to support their claim and, as noted above, the evidence strongly supports the opposite conclusion.

234. It is worth stepping back to view the evidence on this point as a whole. As is essentially undisputed, differential rates of self-response among different subpopulations are common, and the Census Bureau struggles to cure the defects caused by those differentially low self-response rates with its NRFU operations. For the 2020 census, the Census Bureau plans to add a question about citizenship that it knows will cause an additional, incremental differential decline in self-response rates in a defined subpopulation. But, Defendants argue, this will not result in a net undercount of that subpopulation, because its NRFU operations—which *never* work perfectly—will somehow work perfectly this time. Meanwhile, Plaintiffs have introduced overwhelming evidence (most of which is acknowledged, accepted, or generated by the Census Bureau itself) that, in this context, the Census Bureau's NRFU operations will instead work *less* well than ever—specifically with respect to the very people whose households will be differentially likely not to self-respond to the census questionnaire. Indeed, the evidence demonstrates that NRFU operations will simply replicate the same problems as the original attempt to obtain self-responses from those households.

235. Seen in that light, it is impossible to accept Defendants' interpretation of the facts. In the face of Plaintiffs' strong evidence that the citizenship question will cause a differential decline in self-response rates among noncitizen households, Defendants demand that Plaintiffs also rebut their unsupported assurances that the Census Bureau will figure out a way to fix the problem, even though it has never done so before. To the extent that Plaintiffs must carry that additional burden, they have done so, as their evidence about NRFU's inadequacies in this context is far more persuasive than Defendants' conclusory assertions that NRFU will suddenly work exactly as hoped. In any event, on the whole, a preponderance of the evidence establishes that the incremental net differential decline in self-response rates among noncitizen households caused by the citizenship question, and any similar decline among Hispanics, will remain uncured by NRFU, and will thus ripen into an incremental net differential undercount of the people who live in such households.

236. In sum, the Court find that the addition of a citizenship question to the 2020 census will cause an incremental net decline in self-response rates of at least 5.8% among noncitizen households, and a significant but unquantified net decline in self-response rates among Hispanic households. The Census Bureau's NRFU operations will not remedy those declines, which means that they will translate into an incremental net differential undercount of people who live in such households in the 2020 census.

237 Admittedly, it is difficult to precisely quantify the exact size of the net differential undercounts attributable to the citizenship question. Significantly,

though, that is because of the difficulty of quantifying the exact effects of the *Census Bureau*'s efforts to fix the problem, a subject about which there is frustratingly little quantitative evidence in the record. Starting with the conservative estimate of a 5.8% net decline in self-response rates among noncitizen households, the Court can find little justification in the record to depart from that estimate when arriving at a finding of the likely net undercount of people who live in noncitizen households. Indeed, as already discussed at great length, the evidence overwhelmingly suggests that NRFU operations will simply replicate all of the same effects on noncitizen response that will cause the decline in self-response in the first place. *See supra* ¶¶ 213-29. On the other side of the ledger, Defendants have offered no quantifiable evidence of their own to support, much less quantify, their assertions of NRFU's hoped-for curative effects.

238. The record does allow the Court to calculate a minimum likely net differential undercount of people who live in noncitizen households. If household size were distributed evenly across all households, both counted and uncounted, it would be possible to predict that an uncorrected 5.8% decline in self-response rates among noncitizen households would translate directly into a 5.8% net undercount of the people who live in those households. But the record evidence in these cases indicates that household size is *not* distributed equally among self-responding and non-self-responding households: instead, households that do *not* self-respond are likely to be larger than those that do. *See* Tr. 119-20, 733. The Court therefore finds that the 5.8% decline in self-response rates will translate into a net undercount of people who live in such households of

at least 5.8%, and likely more. Providing further support for that conclusion is the disproportionate likelihood that noncitizen households that do self-respond will leave individuals off their questionnaires, contributing to a differential undercount of people who live in such households in a way not captured by the initial 5.8% estimate at all. The Court therefore finds that the addition of a citizenship question will cause an incremental differential net undercount of people who live in noncitizen households of approximately 5.8%, and likely more.

239. Quantifying the likely net undercount of Hispanics caused by the citizenship question is more difficult on the basis of the evidence in the record. Nevertheless, the Court finds that a preponderance of the evidence indicates that the citizenship question will cause a nonzero net undercount of Hispanics.

240. Defendants' objections to these factual findings rest primarily on Dr. Abowd's double-negative testimony that he has not seen any "credible quantitative data" that the Census Bureau's NRFU operations will not prevent net undercounts of noncitizen and Hispanic populations. *See* Tr. 1214. But Defendants' reliance on that testimony is ultimately unpersuasive, for two reasons. First, Dr. Abowd did not opine (and no other record evidence suggests) that NRFU operations *will* remedy any undercounts caused by the addition of a citizenship question to the 2020 census. Instead, he opined, "in a very careful way," only that he had not seen evidence sufficient to prove to his own standards that a net differential undercount would in

fact result. *See id.* at 925-26, 1165-66.[40] Even so, Dr. Abowd testified that the Census Bureau had not run the type of randomized controlled trial that would have met his own standard of "credible, quantitative evidence," but was nevertheless relying on the results of the "natural experiment" analyzed in the Brown Memo to plan for the 2020 census because, as he testified, the Census Bureau "believe[d] they are the best available data." *Id.* at 926; *see also id.* at 923-26.

241. Second, although Dr. Abowd's credibility, expertise, and dedication to public service impressed the Court in almost every respect, his opinion on this point does not shake the Court's confidence in its finding, by a preponderance of the evidence, that the addition of a citizenship question will cause a net differential undercount of noncitizens and Hispanics. For one thing, as Chief Scientist of the Census Bureau, his responsibilities are vastly different than those of a federal court, and his testimony and written analyses make clear that he and the Census Bureau insist (at least in the abstract) on a far greater degree of statistical confidence than that which applies in federal civil litigation.[41]

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[40] Additionally, Dr. Abowd testified that, although he would not adopt the same conclusion as Dr. John Thompson, he "respected" Dr. Thompson's opinion that the citizenship question would cause a net undercount of noncitizens and Hispanics. *See* Tr. 1221.

[41] Notably, Dr. Abowd testified that a statistical analysis capable of achieving his preferred level of certainty would require non-public data in the Census Bureau's exclusive possession and control —and that it would have taken his team of experts up to a year to conduct. Tr. 1216-18, 1290-92. (For what it is worth, he testified that the Census Bureau did not bother to do that work largely because he did not need it to conclude that addition of a citizenship question was a mistake. *See id.* at 1290-92.) It would be per-

The Court's task is not to determine whether the evidence on the net differential undercounts caused by the citizenship question can satisfy the Census Bureau's high statistical standards. It is, instead, to determine whether Plaintiffs have proved by a preponderance of the evidence that the addition of a citizenship question will cause such undercounts. For the reasons stated above, the Court finds that Plaintiffs have done so.

4. Effects of the Citizenship Question on Apportionment Among and Within States

242. Next, Plaintiffs have also proved that the net differential undercount of people who live in noncitizen households will translate into several further concrete harms. First, the Court finds by a preponderance of the evidence that the addition of a citizenship question will cause or is likely to cause several jurisdictions to lose seats in the next congressional apportionment and that it will cause another set of jurisdictions to lose political representation in the next round of intrastate redistricting.

243. To begin, the Court finds that several states, including some that are Plaintiffs here and some in which NGO Plaintiffs' members reside, will lose at least

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verse indeed to hold that Plaintiffs lack standing to argue that Secretary Ross's decision substantively violated the APA because the Census Bureau did not adequately test the precise effects of the citizenship question on the very ground that the Census Bureau, the sole entity in the country capable of conducting such a test, failed to do so. Thankfully, the Court need not go there, as Plaintiffs have satisfied their burden of proving by the applicable standard here—namely, a preponderance of the evidence—that the citizenship question would result in a net differential undercount of people who live in noncitizen households of at least 5.8%.

one seat in the congressional reapportionment based on the 2020 census data. Plaintiffs' expert Dr. Christopher Warshaw modeled the effects of a net differential undercount of people who live in noncitizen households on congressional apportionment. *See* Docket No. 526-1 ("Warshaw Decl."). (Dr. Warshaw also independently modeled the effects of various net differential undercounts of people who live in noncitizen households *and* Hispanics together. *See id.*). Using the Method of Equal Proportions, which Congress adopted as the apportionment method in 1941, Dr. Warshaw calculated that an incremental 5.8% net differential undercount of people who live in noncitizen households will make California "extremely likely" to lose a congressional seat that it would not lose otherwise. *Id.* ¶ 46; *see id.* at 23 (Table 6) & ¶¶ 42-46.

244. Dr. Warshaw's findings also support the conclusion that, in the event that the net differential undercount of people who live in noncitizen households reaches 10%—or if there is a mere 5.8% differential undercount both of people who live in noncitizen households *and* Hispanics—then Texas, Arizona, Florida, and Plaintiffs New York and Illinois will face a significant risk of an apportionment loss. *See id.* ¶¶ 46-47. As noted above, the Court cannot quantify exactly how much higher than 5.8% the noncitizen net differential undercount is likely to be and how high the Hispanic net differential undercount will be. *See supra* ¶¶ 238-39. But, based on the risks discussed above, the Court can say, and does find, that Texas, Arizona, Florida, and Plaintiffs New York and Illinois face a substantial risk of losing a seat in the next congressional reapportionment because of the addition of a citizenship question to the 2020 census.

245. The Court finds that Dr. Warshaw's calculations are credible and persuasive. As they are the most credible quantitative evidence in the record about the apportionment consequences of adding a citizenship question to the census questionnaire, the Court finds by a preponderance of the evidence that California residents face a certainly impending loss of representation in the House of Representatives. Similarly, Texas, Arizona, Florida, New York, and Illinois face a substantial risk of losing a seat. In other words, based on the facts as proved here by a preponderance of the evidence, the Court finds that residents of those states face a substantial risk of a loss of representation in the House of Representatives.

246. The Court finds further that the citizenship question will have similar effects on *intra*state apportionment. States—including Plaintiffs here—rely on federal decennial census data to carry out their own *intra*state redistricting. *See, e.g.*, Del. Const. art. 2, § 2A; Iowa Const. art. III, § 34; Md. Code Ann., Elec. Law § 8-701; Mass. Const. amend. art. CI, §§ 1-2; Minn. Const. art. 4, §§ 2-3; Minn. Stat. Ann. § 600.18; N.J. Const. art. 4, § 2 ¶¶ 1, 3; N.Y. Const. art. III, §§ 4-5 & 5-a[42];

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[42] On their face, Sections 4 and 5 of Article III of the New York Constitution appear to require that the state's Senate and Assembly districts be apportioned on the basis of "inhabitants, excluding aliens," but Section 5-a, ratified in 1969, amended those provisions —somewhat inartfully—by redefining the term "inhabitants, excluding aliens" to mean "the whole number of persons." N.Y. Const. art. III, § 5-a ("For the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term 'inhabitants, excluding aliens' shall mean the whole number of persons."); *see also* Docket No. 504-1 ("Breitbart Aff.") ¶ 4. Accordingly, the New York Constitution now requires that

Va. Code Ann. § 30-265; Wash. Rev. Code § 44.05.090; *see also Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003) ("When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population."); *Department of Commerce*, 525 U.S. at 334 ("States use the population numbers generated by the federal decennial census for federal congressional redistricting."). The addition of a citizenship question on the census will cause some jurisdictions and their residents to lose political power in that process as well.

247. Dr. Warshaw analyzed the impact of the citizenship question on intrastate redistricting, and credibly found that a mere *two* percent differential undercount of people who live in noncitizen households will lower the population enumerations, and statewide population shares, of several jurisdictions that are home to a disproportionate share of their states' populations living in noncitizen households. *See* Warshaw Decl. 28 (Table 8) & ¶¶ 53-55, 57-59. New York City is a prime example. New York City contains approximately forty-three percent of the total state population, but approximately seventy-one percent of the state's noncitizen population. Docket No. 504-1 ("Breitbart Aff.") ¶ 12; *see also* Docket No. 504-2 ("Supp. Breitbart Aff."). Dr. Warshaw calculated that if the citizenship question causes a mere two percent net differential undercount of people who live in noncitizen households, that will lower the statewide population shares of Phoenix, Arizona; Los Angeles County, California; Monterey County, California; Miami, Florida; Chicago, Illinois; Prince

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the state's Senate and Assembly districts be apportioned on the basis of total population count data from the decennial census.

George's County, Maryland; New York City; Columbus, Ohio; Philadelphia, Pennsylvania; Pittsburgh, Pennsylvania; Central Falls, Rhode Island; Providence, Rhode Island; Cameron County, Texas; El Paso County, Texas; Hidalgo County, Texas; and Seattle, Washington. Warshaw Decl. 28 (Table 8) & ¶¶ 53-55, 57-59. The effect will be particularly pronounced for Plaintiffs Central Falls and Providence, Rhode Island; Cameron, Hidalgo, and El Paso Counties, Texas; Phoenix, Arizona; Miami, Florida; and New York City. *See id.* ¶¶ 54-55, 59.[43]

248. Any net differential undercount of people who live in noncitizen households, and especially a net differential undercount of 5.8%, will dilute the political power of such jurisdictions. Similarly, the people who *live* in those jurisdictions will suffer a corresponding decrease in political power.

249. The Court also finds, based on Dr. Warshaw's credible calculations, that Plaintiff Colorado will suffer a net undercount of its total population of at least 0.7%, an estimate Dr. Warshaw calculated using the conservative projection of an estimated 5.8% net differential undercount of people who live in noncitizen households. *See* Warshaw Decl. 19 (Table 5). Furthermore, because

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[43] Dr. Warshaw made a similar calculation premised on a scenario in which there is a two percent net differential undercount of (1) people who live in noncitizen households and (2) people who live in noncitizen households *and* Hispanic citizens. *See* Warshaw Decl. ¶¶ 24, 25, 53, 58. In that scenario, the statewide population shares of the same jurisdictions described above would be reduced. The effects would be particularly pronounced for Central Falls and Providence, Rhode Island; Cameron, Hidalgo, and El Paso Counties, Texas; Phoenix, Arizona; and New York City. Warshaw Decl. ¶¶ 54, 55.

Colorado is home to a significant population of people who live in noncitizen households, *any* net differential undercount of that population greater than zero will cause Colorado's enumerated population to be lower than it otherwise would be. *See, e.g.*, PX-324 (illustrating that if there is a 2% undercount of noncitizens in Colorado, the state's population will be undercounted by 0.2%). Similarly, because Colorado is home to a significant population of Hispanics, any net differential undercount of that population greater than zero will cause Colorado's enumerated population to be lower than it otherwise would be.

5. Effects of the Citizenship Question on Funding to, and Within, States

250. A net undercount of people who live in noncitizen households will also cause states (and their residents) to lose access to federal funding from domestic financial assistance programs that allocate funding based on census-tied geographic formulas. *See* Docket No. 508-1 ("Reamer Decl."), ¶¶ 15-17, 83. A large number of federal domestic financial assistance programs rely on census data to allocate money. In fiscal year 2016, for example, at least 320 such programs allocated about $900 billion using census-derived data. *See id.* ¶ 9. Plaintiffs' expert witness Dr. Andrew Reamer calculated the effects of a net differential undercount of people who live in noncitizen households on several such programs. Of the programs Dr. Reamer analyzed, eighteen are "state-share" programs, which rely in whole or part on the state's share of the total U.S.

population. *Id.* ¶¶ 10, 16-17.[44] The rest are programs that use the Federal Medical Assistance Percentage ("FMAP") reimbursement formula. *See id.*[45] These programs—and many others, including those that rely on decennial census data less directly, *see id.* ¶¶ 26-29—are sensitive to changes in the decennial census count. Dr. Reamer calculated that a net differential undercount of people who live in noncitizen households[46] and Hispanic populations of as little as two percent—much

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[44] These are: Federal Transit Formula Grants, Community Development Block Grants/Entitlement Grants, Crime Victim Assistance, Title I Grants to Local Educational Authorities ("LEAs"), Special Education Grants, State Children's Health Insurance Program ("CHIP"), Head Start, Supplemental Nutrition Program for Women, Infants, and Children ("WIC"), Child Care and Development Block Grant, Supporting Effective Instruction State Grants, Workforce Innovation and Opportunity Act ("WIOA") Youth Activities, Rehabilitation Services: Vocational Rehabilitation Grants to the States, Unemployment Insurance administrative costs, Block Grants for Prevention and Treatment of Substance Abuse, Social Services Block Grants, Career and Technical Education—Basic Grants to States, WIOA Disclosed Worker Formula Grants, Special Programs for the Aging, Title III, Part C, Nutrition Services. *See* PX-329.

[45] These are: Medical Assistance Program (traditional Medicaid), CHIP, Foster Care, Child Care, Adoption Assistance, and Medicare Part D Clawback. *See* PX-329.

[46] To perform his calculations, Dr. Reamer assumed that the seven net undercount scenarios projected by Dr. Warshaw would occur, and he then projected the effects that those scenarios would have on program funding. *See* Reamer Decl. ¶¶ 13-14. (Dr. Reamer's declaration somewhat inartfully refers to people who live in noncitizen households—the relevant group for purposes of Dr. Warshaw's projected net undercount scenarios—as "noncitizens," but it is clear that Dr. Reamer is referring to the same set of people that was the subject of Dr. Warshaw's projections, namely those who live in households containing at least one noncitizen. *See id.*).

lower than the net differential undercount would likely be—will cause Plaintiffs New York and New Jersey, as well as California, Texas, Florida, Nevada, and Hawaii, to lose funding under the state-share programs, and would cause Arizona, Texas, Florida, Nevada, and Hawaii to lose funding under the FMAP programs. *See id.* ¶¶ 16-17, 33, 35 & 16, 17, 20, 23, 27 (Tables). Larger net undercounts would, naturally, lead to correspondingly larger losses. *Id.*; *see also id.* ¶ 19.

251. The Court finds Dr. Reamer's testimony to be credible, and his analysis persuasive. Accordingly, the Court finds that even under an almost implausibly conservative projection of the net differential undercount of people who live in noncitizen households, Plaintiffs New York and New Jersey, along with Arizona, California, Texas, Florida, Nevada, and Hawaii will lose some amount of federal funding as a result of the addition of the citizenship question. More specifically, the Court finds that Plaintiffs New York and New Jersey, along with California, Texas, Florida, Nevada, and Hawaii, would lose funding under the WIC, Social Services Block Grants, and Title I Grants to LEAs programs. *See* Reamer Decl. ¶¶ 46-47, 51-52, 61-62. Those are merely illustrative; as Dr. Reamer testified, those states would lose funding from other state-share programs as well. *See* Tr. 517-18.

252. The Court further finds, based on Dr. Reamer's testimony, that a two percent net differential undercount of people who live in noncitizen households will cause Plaintiffs Illinois, Massachusetts, Maryland, Washington, and the District of Columbia to lose funding under the Title I LEA Grant program and the Social Services Block Grant Program. *See* Reamer

Decl. 17 (Table), 20 (Table) & ¶¶ 51-52, 61-62. A net differential undercount of people who live in noncitizen households of at least two percent will also cause Plaintiffs Illinois and Washington to lose Medicaid funds, and Plaintiffs Oregon, New Mexico, and Washington to lose CHIP funds. *Id.* at 23, 27 (Tables) & ¶¶ 70-71, 81-82.

253. In addition to the state-share programs Dr. Reamer testified about, Plaintiffs have proved that even a tiny net differential undercount of people who live in noncitizen households will cause several Plaintiffs to lose funds from federal programs that distribute resources on the basis of census-derived data, including Community-Based Child Abuse Prevention ("CBCAP") Grants, Older Americans Act ("OAA") Grants for State and Community Programs on Aging, Title II, Part A and Title IV, Part A funding under the Every Student Succeeds Act, Temporary Assistance for Needy Families ("TANF") funding, Low-Income Home Energy Assistance, Program ("LIHEAP") funding, and Community Services Block Grants ("CSBG"). Docket No. 498-12 ("Haney Aff."), ¶¶ 5-8; Docket No. 498-14 ("Harmon Aff."), ¶¶ 10-13, 17; Docket No. 498-5 ("Franklin Aff."), ¶¶ 6-10; Docket No. 501-1 ("Tiema-Massie Aff."), ¶ 11. Some such programs require states to use census-derived data to distribute funding to City and County Plaintiffs, including the Victims of Crime Act program, TANF, LIHEAP, the WIOA program, and CSBG. Franklin Aff. ¶¶ 6-10; Tiema-Massie Aff. ¶ 11. The City and County Plaintiffs receive funds under these programs based on their relative share of the relevant population within a state. For instance, states are required to distribute TANF, LIHEAP, WIOA, and CSBG funds to localities based in part on the number of low-

income individuals who reside in the jurisdiction. *See* Franklin Aff. ¶¶ 7-8, 10; Tiema-Massie Aff. ¶ 11.

254. Similarly, many federal funding programs provide direct funding to localities based on census-derived information, including the Community Development Block Grant ("CDBG"), Emergency Solutions Grant ("ESG") program, and the HOME Investment Partnerships Program. *See* Docket No. 498-7 ("Freedman Aff."), ¶¶ 7, 10, 12. These programs provide funding to cities and counties based at least in part on such jurisdictions' share of the overall population count relative to other metropolitan areas and share of the population in poverty. *Id.*

255. Dr. Warshaw's testimony shows that under any plausible net differential undercount scenario resulting from the addition of a citizenship question, nearly all Plaintiff Cities and Counties will lose population shares relative to their states. *See* Warshaw Decl. 28 (Table 8) & ¶¶ 59-61. Those cities and counties—specifically, Cameron, Hidalgo, and El Paso Counties, Texas; Monterey County in California; and Providence and Central Falls in Rhode Island, *id.* at 26 (Table 7)—will lose funds under these programs, whether the funds are routed through state governments or distributed from the federal government directly.

256. The Court also finds—based on uncontradicted evidence in the record—that Plaintiff MRNY has identified several members by name who reside in New York City and who benefit from the federal funding programs that Plaintiffs have shown are tied specifically to federal census data. *See* Docket No. 503-1 ("Altschuler Decl."), ¶¶ 24-30; *see also* Docket No. 503-2 ("Supp. Altschuler Decl."); Tr. 472. MRNY members Julissa

Bisono and Diana Zarumeno are both residents of Queens County, New York, whose children attend public schools that receive Title I funding. Altschuler Decl. ¶¶ 25-26; Supp. Altschuler Decl. ¶¶ 15-16. MRNY member Maria Hernandez is a resident of Kings County, New York, whose child attends a public school that receives Title I funding. Altschuler Decl. ¶ 27; Supp. Altschuler Decl. ¶ 17. MRNY member Lorena Mendez is a resident of Kings County whose child attends a Head Start program. Altschuler Decl. ¶ 28; Supp. Altschuler Decl. ¶ 18. MRNY member Perla Lopez and MRNY member Yatziri Tovar live in Queens County, New York, and Bronx County, New York, respectively. Altschuler Decl. ¶¶ 29-30; Supp. Altschuler Decl. ¶¶ 19-20. Altschuler also identified an unnamed MRNY member who is a U.S. citizen and a resident of Long Island, New York. Altschuler Decl. ¶ 16; Supp. Altschuler Decl. ¶ 11.

257. The Court also finds, based on uncontradicted testimony and undisputed documentary evidence in the record, that ADC has members residing in all fifty states and in the District of Columbia, including 172 in Arizona; 1,441 in California; 1,296 in the District of Columbia; 551 in Florida; 437 in Illinois; 612 in Maryland; 819 in New York; 341 in Ohio; 1,341 in Pennsylvania; 30 in Rhode Island; 408 in Texas; and 186 in Washington State. Docket No. 498-16 ("Khalaf Decl."), ¶¶ 34-35; *see also* Docket No. 498-17 ("Supp. Khalaf Decl."), ¶ 7; Tr. 286. For example, ADC members Dr. Souhail Toubia, Dr. Diane Shammas, and George Majeed Khoury reside in California; Dr. Debbie AlMontaser resides in New York; Shatha Atiya resides in Florida; Dr. Safa Rifka and Dr. Doo'a Taha reside in the District

of Columbia; and Abed Awad resides in New Jersey. Khalaf Aff. ¶ 31.

258. Finally, to the extent relevant here, the Court finds that Plaintiff NYIC has members who benefit from census-tied funding programs. NYIC member Chhaya Community Development Corporation ("Chhaya") receives funding through the Community Development Block Grant program. Docket No. 498-19 ("Plum Aff."), at ¶ 6; *see also* Docket No. 498-20 ("Supp. Plum Aff."). NYIC members Family Health Centers at NYU Langone, Little Sisters of the Assumption Family Health Services ("LSA"), Korean Community Services of Metropolitan New York, and Planned Parenthood of New York City all receive funding through Medicaid to provide community health services. *Id.* ¶ 7. NYIC member Chinese-American Planning Council receives funding through the WIOA for education and training services for job-seekers. *Id.* ¶ 8.

6. Effects of the Citizenship Question on the Quality and Accuracy of Census Data

259. Next, the Court finds that the addition of a citizenship question to the 2020 census will harm the quality of the resulting census data regardless of whether it also leads to a net differential undercount of people who live in noncitizen and Hispanic households. Much of that decline will be attributable to the fact that, because of the decline in self-response rates, more enumerations will be conducted through NRFU efforts. March 1 Memo, at AR 1311. As all agree, NRFU generates lower quality data than self-responses—in large part because it relies more heavily on proxies and imputation. Tr. 33-35; January 19 Memo, at AR 1281. There is essentially no dispute about this point. Dr.

Abowd—Defendants' expert—"consistently characterized data produced by lower self-response rates as being less accurate" in his testimony, Tr. 882; *see* March 1 Memo, at AR 1311, and described how that inaccuracy would hamper the work of demographers and policymakers at all levels of government, *see* Tr. 1222-23.

260. Credible testimony confirms that the citizenship question and consequent decline in self-response rates are likely to harm the resulting data in several ways. For instance, information about subgroups that comprise a jurisdiction—called local-level "characteristic data"—will decline in quality, even if the *total* population count within that jurisdiction is accurate. Tr. 302-04. This will be true regardless of whether NRFU is able to remedy the decline in self-response rates for the jurisdiction as a whole. *See id.* at 1221-23.

261. In fact, NRFU operations may actually make the problem worse. The Census Bureau's own analysis concluded that enumeration errors are more common in NRFU because NRFU data "are much more likely to be collected from a proxy rather than a household member," and proxies have "less accurate information" about the household than self-responders. January 19 Memo, at AR 1282. In particular (and as discussed above), proxies result in correct enumerations only about seventy percent of the time, compared to ninety-seven percent for self-responses. *Id.* And proxies "supply poor quality individual demographic and socioeconomic characteristic information about the person on behalf of whom they are responding." Brown Memo at 41. As Dr. Jarmin put it, the accuracy of NRFU "is

less than self-response" and, within NRFU, "proxy response" is less accurate still. Jarmin Dep. 308.

262. Dr. Abowd testified that, whatever else happens as a result of the citizenship question, "gross omissions"—people left off self-response, responses to in-person NRFU enumerators, and proxy responses—will increase. Tr. 1221. In Dr. Abowd's view, this will harm the quality of the data, regardless of what happens to the overall count. *Id.* at 1222. Indeed, even where a decline in self-response does not lead to an overall net undercount, it will create inaccuracies in subgroup data—particularly at the local level—that can be quite serious in and of themselves. *See* Tr. 309, 351-54.

263. Several Governmental Plaintiffs proved that they rely on accurate data to perform essential governmental functions. New York City, for example, makes important decisions about how to allocate public services in reliance on demographic data derived from the census, as when its Department of Education redraws school zone boundary lines, Tr. 305-06; when its Department of Health deploys resources based on its best understanding of the age, race, and Hispanic origin characteristics within particular communities, *id.* at 307-08; and when the Mayor's Office of Immigrant Affairs distributes English-language services based on its understanding of where the highest concentration of limited-English-proficient ("LEP") populations live, *id.* at 307. Dr. Salvo also testified that New York City is expecting a forty-six percent increase in its sixty-five-and-over population by 2040, and is currently attempting to project where and when that demographic change will be felt so that it can design and deploy

appropriate infrastructure and physical accommodations. *See id.* at 356-57. A decline in the quality of decennial census data will degrade the City's ability to make and implement such policies.

7. Secretary Ross's Decision Has Caused Plaintiffs to Divert Resources

264. Secretary Ross's decision to add a citizenship question to the census will cause, and has already has caused, another harm to Plaintiffs: the diversion of precious resources. The NGO Plaintiffs—NYIC, MRNY, ADC/ADCRI, and CASA—have already diverted significant resources from their organizational missions and other priorities to address the effects of a citizenship question. Each of the NGO Plaintiffs is deeply committed to a laudable mission of increasing political participation, promoting civic engagement, and advancing the interests of immigrant communities, especially immigrant communities of color.

265. Plaintiff NYIC is an "umbrella policy and advocacy organization for nearly 200 groups in New York State." Docket No. 489-1 ("Choi Decl."), ¶ 2; *see also* Docket No. 489-2 ("Supp. Choi Decl."); Tr. 21-22. NYIC aims to "unite immigrants, members, and allies so that all New Yorkers can thrive," is devoted to "advanc[ing] the interests of New York's diverse immigrant communities," and "advocates for laws, policies, and programs that lead to justice and opportunity for all immigrant groups." Choi Decl. ¶ 3. NYIC has a "fundamental interest in ensuring as complete and accurate a Decennial Census as possible," *id.* ¶ 6, partly because its member organizations receive funding through census-tied federal funding programs, *id.*, and partly because the communities its member organiza-

tions serve will only receive the full political representation to which they are entitled if the people in those communities are fully counted, *id.* at 8. For that reason, NYIC has committed itself to ensuring a complete and accurate census count since at least 2010. During the 2010 cycle, NYIC engaged in widespread efforts to encourage participation, including by coordinating public service announcements in sixty-nine newspapers (and in twenty-four languages), and by holding press briefings with elected officials. *Id.* ¶ 9.

266. NYIC has already started similar efforts with respect to the 2020 census. In March 2018, for instance, NYIC helped launch New York Counts 2020, a coalition of New York stakeholders committed to a "fair and complete" census count. *Id.* ¶ 10. More broadly, NYIC has been investing its organizational resources in outreach, education, and advocacy to increase participation in the 2020 census. *Id.* ¶ 11. Before the addition of the citizenship question was announced, NYIC planned to spend approximately $625,000 on such education and outreach efforts over a three-year period leading up to the 2020 census. *Id.* ¶ 16. NYIC testifies that it has increased that spending by approximately sixty percent "as a result of the decision to add a citizenship question," and will now spend approximately $1 million on its efforts. *Id.* ¶¶ 16-17; *see* Docket No. 498-19 ("Plum Decl."), ¶ 14 (stating that the extra spending "represents an increase of approximately 60% over what the organization would have spent in the absence of a citizenship question"); *see also* Tr. 286. Of that additional amount (roughly $375,000), NYIC has already spent about $93,000 in funds it would not have spent absent the addition of the citizenship question. Choi Decl. ¶¶ 16-17.

267. The Court also finds, based on the undisputed testimony of NYIC's Vice President of Policy Elizabeth Plum, that NYIC has diverted, and will continue to divert, resources from its organizational mission because of the citizenship question. As Plum testified, NYIC "was undertaking a study and publication on adult English literacy and workforce development, which examines the critical role of English language acquisition in integrating immigrants into the workforce and preparing them to earn higher wages," but "that project has been postponed indefinitely because of the resources required to perform additional Census outreach and education work." Plum Decl. ¶ 23. Plum also testified that "NYIC and some of its member organizations will have to divert resources that would have been spent on education and outreach efforts to increase Census response rates among immigrant communities of color towards addressing the heightened fear generated by the citizenship question." *Id.*

268. Notably, Defendants dispute none of this. They merely contend that the cause of NYIC's increased spending is not the citizenship question itself, but the macroenvironment of fear and distrust of government. Defs' Post-Trial Br. 39-42, ¶¶ 261, 272. The Court is not persuaded. Plaintiffs' testimony credibly makes clear that NYIC increased its expenditures "as a result" of the addition of the citizenship question—a statement made all the more credible and persuasive given that the macroenvironment prevailing at the time NYIC made its initial funding decisions was similar to the macroenvironment at the time it made the decision to *increase* those expenditures. Choi Decl. ¶ 17; *see* Tr. 616-17, 942-44. The Court has no trouble concluding by a preponderance of the evidence that NYIC

has incurred (and will continue to incur) these extra expenses, and has diverted resources away from its organizational mission, because of the citizenship question and not because of Defendants' proposed alternative causes.

269. Plaintiff MRNY is a nonprofit membership organization with offices and service centers in Brooklyn, Queens, Staten Island, Suffolk County, and White Plains, New York. *See* Altschuler Decl. ¶ 2. MRNY's mission is to "build the power of immigrant and working-class communities." *Id.* ¶ 3. MRNY has an "ongoing commitment to promoting engagement in the Decennial Census among its members and constituents." *Id.* ¶ 7. During the 2010 cycle, MRNY spent about $150,000 and more than one thousand personnel hours on its census education and outreach efforts. *Id.* ¶ 8. MRNY is conducting similar outreach and education programs this time around, and has already begun creating informational resources and training staff members to conduct outreach and encourage census response, "particularly" among Spanish-speaking communities. *Id.* ¶ 20.

270. Daniel Altschuler, MRNY's Director of Civic Engagement and Research, *id.* ¶ 1, testified that the organization "will be forced to expend more resources than initially anticipated to try to reduce the negative effect" of the citizenship question among "the immigrant communities of color it serves." *Id.* ¶ 19. More precisely, MRNY "anticipates expending at least double the amount on 2020 Census education and outreach" than it did for the 2010 census. *Id.* Altschuler testified that "[b]ecause of the need to increase the time and money spent on Census outreach due to the addition of the citizenship question, MRNY will need to

divert resources from other areas critical to its mission[,] including civic engagement and community organizing on other issues." *Id.* ¶ 21. Indeed, MRNY has already done so. *Id.* Separate and apart from the diversion of those resources, MRNY has diverted resources towards participating in this lawsuit. *Id.* ¶ 22.

271. Once again, Defendants contest very little of Altschuler's credible testimony about MRNY's activities, focusing only on the causal connection between the citizenship question and MRNY's additional expenditures and noting that MRNY "acknowledges that there is a general increased fear due to the Trump Administration." Defs.' Post-Trial Br. 39 (alterations and internal quotation marks omitted). But MRNY has submitted evidence of a causal connection between the citizenship question itself and the diversion of its resources in the form of Altschuler's credible testimony, and Defendants offer nothing at all in rebuttal. Once again, the Court has no trouble concluding by a preponderance of the evidence that MRNY has doubled its 2020 census expenditures because of the addition of the citizenship question.

272. Plaintiffs ADC and ADCRI were founded by Senator James G. Abourezk—the first Arab American to serve in the United States Senate—in 1980 and 1981, respectively. Khalaf Decl. ¶¶ 4-5. ADC is a "civil rights membership organization that is committed to defending and promoting the rights and liberties of Arab Americans and other persons of Arab heritage." *Id.* ¶ 6. ADC and ADCRI have long track records of census-related work. For example, ADC has served on Census Bureau advisory committees "in numerous capacities" since the 1980s, and has conducted census-

related campaign and policy initiatives since the 2000 census cycle. *Id.* ¶ 13. ADC and ADCRI have increased their planned spending on 2020 census education and outreach by $150,000 compared to 2010, "largely" because of "the presence of the citizenship question." *Id.* ¶ 28. As with MRNY, Defendants do not dispute any of these facts, except to object that ADC has not "analyze[d] any incremental increase in expenditures due to the citizenship question." Defs.' Post-Trial Br. 39, ¶ 260. Again, however, Defendants offer no evidence to rebut Plaintiffs' credible testimony that precisely such an incremental increase is occurring, and the Court finds that it is.

273. Plaintiff CASA is a nonprofit membership organization headquartered in Maryland, with additional offices in Virginia and Pennsylvania. Docket No. 498-3 ("Escobar Decl."), at ¶ 4. CASA is the largest membership-based immigrants' rights organization in the mid-Atlantic region. *See id.* CASA's mission is "to create a more just society by increasing the power of and improving the quality of life of low-income immigrant communities." *Id.* ¶ 5. CASA offers social, health, education, job training, employment, and legal services to such communities, serving "nearly 20,000" people each year through its physical offices alone. *Id.* Part of CASA's work in service of its mission is "promoting engagement in the Decennial Census among its members, constituents, and communities." *Id.* ¶ 7. George Escobar, the organization's Chief of Programs and Services, *id.* ¶ 1, testified that "[m]ember participation in the Decennial Census advances CASA's mission by increasing the political power of low-income immigrant communities and improving quality of life

for those communities through increased population-driven government funding," *id.* ¶ 7.

274. Given its thirty-year history working with immigrant communities, CASA has "consistently been a 'go-to' organizational partner" for outreach and education efforts concerning the census. *Id.* ¶ 8. Because of the addition of a citizenship question, CASA is now "diverting [its] limited resources in an effort to encourage participation in the Decennial Census." *Id.* ¶ 15. Indeed, CASA is planning a "massive response" to mitigate the effects of the citizenship question, *id.* ¶ 25, and "will have to reorganize its communication team and reassign staff to Census outreach and education to a level not previously anticipated," *id.* ¶ 26. Given the unanticipated nature of those expenses, CASA will have to fund these efforts through "other sources"—"perhaps including CASA reserves"—and additional volunteers. *Id.* CASA has already begun some of these efforts. *Id.* ¶ 27. Defendants, for their part, nowhere dispute (or even discuss) any of these facts. Instead, Defendants level the same highly general objection to CASA's account as with the other NGO Plaintiffs, namely that Plaintiffs have not "shown any analysis to account for the incremental increase due to the citizenship question." Defs.' Post-Trial Br. 39, ¶ 259.[47] The Court is unpersuaded by Defendants'

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[47] Or at least, the Court presumes that Defendants *meant* to level this criticism at CASA's testimony. Defendants do not discuss Escobar's affidavit anywhere in the relevant section of their brief. *Cf.* Defs.' Post-Trial Br. 41-42, ¶ 272 (briefly citing Escobar's affidavit elsewhere for the proposition that any harm may be attributable to the macroenvironment). Instead, where they broadly criticize the "NGO Plaintiffs" for this purported failure of proof, they curiously cite to the affidavit of Evelyn Rodriguez. *See id.* at 39,

objection to CASA's lack of detail in accounting for the precise incremental increase in expenditures which, by definition, have not happened yet, and finds—by a preponderance of the evidence—that CASA will divert a significant portion of its organizational resources because of the addition of the citizenship question.

275. The Court also finds, based on the undisputed record evidence, that Plaintiffs New York City and the City of Chicago have diverted or will divert resources in an attempt to mitigate the effects of the citizenship question. New York City had originally allocated $4.3 million to its efforts to increase participation in the 2020 census, and then—after Secretary Ross announced his decision—increased that funding to $5.5 million. Tr. 426-29. Plaintiffs also introduced uncontroverted evidence that the City of Chicago will expend additional resources to combat the citizenship question's effects on self-response among immigrant communities in Chicago. *See* Docket No. 488-1 ("Rodriguez Aff."), at ¶ 12; *see also* Tr. 11-12, 21.

C. Conclusions of Law Related to Standing

The Court turns, then, to its conclusions of law with respect to standing. Plaintiffs advance at least five distinct theories of how they have been, or will be, injured due to the addition of a citizenship question on the 2020 census, namely: (1) diminished political representation, both between *and* within states; (2) loss in

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¶ 259. Rodriguez, however, is an advisor to the Mayor of the City of Chicago who testified about Chicago's census-related activities; she has nothing to do with CASA or the other NGO Plaintiffs. *See* Rodriguez Aff. ¶ 1. Small wonder, then, that Defendants did not find any discussion of the NGO Plaintiffs' expenditures in her affidavit.

government funds, again both between *and* within states; (3) harm to the sovereign interests of state and local governments caused by degradation of the census data upon which they rely; (4) diversion of resources; and (5) loss of privacy. The Court begins by addressing the question of certain NGO Plaintiffs' standing to pursue claims based on any of those theories on behalf of their individual members (in addition to any standing they may have to pursue such claims in their own right). The Court then explains its conclusions as to whether each of these forms of injury is legally cognizable and, if so, whether Plaintiffs proved by a preponderance of the evidence that they have been, or will be, injured in that manner. As the Court will explain, it concludes that all five forms of injury are legally cognizable and that, for all but one of the theories—namely, the loss of privacy—at least some Plaintiffs proved by a preponderance that they have suffered, or will suffer, injury in fact sufficient to support standing. The Court then turns to whether Plaintiffs proved that th se forms of injury are fairly traceable to Secretary Ross's decision to add the citizenship question to the 2020 census and whether they are redressable by a favorable decision. Answering both questions in the affirmative, the Court concludes that most, if not all, Plaintiffs have Article III standing to bring the claims in these cases.

The Court notes that, aside from challenging each of Plaintiffs' theories of injury on "traceability" grounds, Defendants make only limited objections to each individual theory of injury. Specifically, Defendants challenge Plaintiffs' apportionment-loss and funding-loss theories only on the ground that they are insufficiently "imminent," Defs.' Post-Trial Br. 67-68, ¶¶ 11-14; the

resource-expenditure theory only on the ground that Plaintiffs' expenditures do not qualify as legally cognizable injuries-in-fact, *id.* at 69-70, ¶¶ 15-19; and the data-degradation theory only on the ground that it is not a sufficiently "concrete" and "tangible" injury for purposes of Article III, *id.* at 70, ¶¶ 20-21. Defendants do not explicitly address Plaintiffs' theory of harm to their privacy interests anywhere in their Proposed Conclusions of Law. The Court cannot ignore the omitted objections given its independent obligation to assess its jurisdiction. But it is worth noting that Defendants themselves do not appear to believe that any of Plaintiffs' injuries are not redressable or—apart from their ambitious objections to traceability, discussed below—fairly traceable to the citizenship question.

1. Associational Standing

Before turning to Plaintiffs' theories of injury, however, the Court briefly addresses the issue of associational standing—namely, whether any of the NGO Plaintiffs have standing to bring claims on behalf of their individual members (in addition to any standing they may have to pursue such claims in their own right). An organization has "associational" standing to bring claims on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Food and Commercial Workers v. Brown Grp.*, 517 U.S. 544, 553 (1996) (internal quotation marks omitted). The third of those requirements is only a prudential one—that is, it is not an element of Article III's jurisdictional

limitations on the power of the federal courts. *See id.* at 554-57.

Applying those standards here, the Court concludes —subject to its broader conclusions regarding standing below—that three of the NGO Plaintiffs, NYIC, MRNY, and ADC, have proved that they have associational standing to seek relief on behalf of certain of their members. The second and third prongs of the analysis can be swiftly addressed. Defendants make no argument with respect to the third, non-jurisdictional prong and, thus, have waived the issue. *Cf. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). In any event, concerns of "administrative convenience and efficiency" favor associational standing, as neither the claims asserted nor the relief requested in this litigation call for significant participation by individual members; at most, the claims call for proof of their residence, but that can be readily established without direct participation. *Food and Commercial Workers*, 517 U.S. at 556-57. As for the second prong of the analysis, which Defendants also fail to contest, the Second Circuit has explained that an interest is "germane" to an organization's purpose if the lawsuit would "reasonably tend to further the general interests that individual members sought to vindicate in joining the association and . . . bears a reasonable connection to the association's knowledge and experience." *Bldg. & Constr. Trades Council of Buffalo & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 149 (2d Cir. 2006). Here, as discussed above, ADC's, MRNY's, and NYIC's missions involve obtaining government benefits for their communities, including—indeed, expressly *by means of*—ensuring a fair and accurate

census count of those communities. Thus, the second prong of the associational standing test is satisfied.

That leaves the first—and only disputed—prong of the analysis: whether the NGO Plaintiffs' members would otherwise have standing to sue in their own right. Although proof of a mere "statistical probability that some of [an organization's] members are threatened with concrete injury" is not enough to satisfy the first prong of associational standing, an organization can meet the first prong by offering "specific allegations" (along, at this stage, with proof) "establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Institute*, 555 U.S. 488, 497-98 (2009). Asserting that "a vague reference to unidentified members does not confer associational standing on an organization," Defendants contend that the NGO Plaintiffs have "failed to identify any member who has standing to sue in his or her own right." Defs.' Post-Trial Br. 71, ¶¶ 25-26. While that is true of CASA, *see generally* Escobar Decl., it is not true of NYIC, MRNY, or ADC. NYIC has identified specific members who receive funds from federal programs that distribute those funds on the basis of census data. *See* Recitation of Facts ¶ 258. Similarly, MRNY has identified specific members who live in New York (and, more specifically, certain counties within the state) whose children attend Head Start programs or public schools that receive Title I funding. *See* Recitation of Facts ¶ 256. And ADC has identified specific members who reside in California, Florida, New York, the District of Columbia, and New Jersey. *See* Recitation of Facts ¶ 257. More generally, there is evidence that ADC has members residing in all fifty states. *Id.* That is sufficient to establish that those

members, although unnamed, would have standing to the extent that standing depends only on the facts of their existence and residence in a particular jurisdiction. As will be discussed below, that is true with respect to some (albeit not all) of the theories of injury at issue here.[48]

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[48] Defendants seem to argue that an organization must identify particular members by name in order to have associational standing to pursue claims on their behalf. *See* Defs.' Post-Trial Br. 71, ¶ 25. But the cases they cite do not support that proposition. As discussed, an organization can satisfy the first prong of the associational standing analysis by offering proof "establishing that at least one identified member ha[s] suffered or would suffer harm." *Summers*, 555 U.S. at 498. It would overread the word "identified" in that context to require an organization to *name* the member who might have standing in his or her own right. In the first place, such specific identifying information is often unnecessary to determine whether a person would have Article III standing. For example, as in this case, whether a person will suffer a loss of political representation depends on the facts of his or her existence and residence within a particular jurisdiction, but not on his or her name. Where those (or other relevant) facts are proved, a court need look no further to conclude that the organization has members who would have standing to pursue a particular claim in their own right. Moreover, to hold that Article III requires an organization to name those of its members who would have standing would be in tension with one of the fundamental purposes of the associational standing doctrine—namely, protecting individuals who might prefer to remain anonymous. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458-60 (1958); *see also Food and Commercial Workers*, 517 U.S. at 551-52. Dicta about "unidentified members" aside, the most that Defendants' cases establish is that a plaintiff must prove "facts sufficient to establish that one or more of its members has suffered, or is threatened with, an injury." *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State Inc.*, 454 U.S. 464, 487 n.23 (1982). For the reasons dis-

In short, three of the NGO Plaintiffs have established —in addition to whatever standing they may have in their own right—that they have standing to the same extent that certain of their individual members would have standing. More specifically, NYIC has standing to the extent that its members who receive funds from census-tied programs would have standing. MRNY has standing to the extent that its individual members residing in New York State generally, and Queens, Brooklyn, the Bronx, and Long Island specifically, would have standing and to the extent that its individual members whose children attend Head Start programs or public schools that receive Title I funding would have standing. And ADC has standing to the extent that its individual members residing in all fifty states and the District of Columbia—and certainly those residing in California, New York, Pennsylvania, Texas, Florida, Rhode Island, Washington State, Arizona, Illinois, Maryland, New Jersey, and the District of Columbia—would have standing.

2. Injury in Fact

With that, the Court turns to Plaintiffs' five theories of injury: (1) loss of political representation, both between states (in congressional reapportionment) and within states (in redistricting); (2) loss of federal funds, also both between and within states; (3) harm to important sovereign interests caused by degradation of the census data on which state and local governments rely; (4) injury to organizations and local governments through the diversion of, and strain inflicted upon, or-

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cussed above, ADC has done so, even as to those members whom it does not identify by name.

ganizational resources; and (5) infringement of privacy interests in the information collected by the census. As noted, the Court concludes that all five forms of injury are legally cognizable and that, as to four of the five—namely, all except the privacy-infringement theory—at least some Plaintiffs have proved by a preponderance of the evidence that they have suffered, or will suffer, injury in fact sufficient to support standing.

a. Diminished Political Representation

First, Plaintiffs have proved that several states are likely to lose one or more seats in the next round of congressional redistricting if the citizenship question is added to the census. *See* Recitation of Facts ¶ 243-45. The Supreme Court has squarely held that the loss of a seat or seats in the House of Representatives "undoubtedly satisfies the injury-in-fact requirement of Article III standing" because of the dilution of political power that results from such an apportionment loss. *Dep't of Commerce*, 525 U.S. at 331; *accord Carey v. Klutznick*, 637 F.2d 834, 836-38 (2d Cir. 1980); *cf. Utah v. Evans*, 536 U.S. 452, 458 (2002). Further, although the census is still months away, such an injury is sufficiently "imminent" to invoke federal-court jurisdiction now. *See Dep't of Commerce*, 525 U.S. at 327, 332 (finding threatened vote dilution because of census modifications sufficiently "imminent" in two lawsuits brought twenty-five months before the census date).

In particular, Plaintiffs have proved that California's prospective loss of a seat in the House of Representatives is "certainly impending." *See* Recitation of Facts ¶¶ 243, 245. And although California is not a Plaintiff here, ADC is and, as discussed, it has individual members who reside in California. *See id.* ¶ 257.

Those individual members' "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Dep't of Commerce*, 525 U.S. at 331.[49] Plaintiffs have also proved that New York and Illinois face a "substantial risk" that they will lose at least one

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[49] Although Defendants do not raise the issue, the jurisdictional nature of the standing inquiry compels the Court to note that ADC's standing does not depend on proof that its members residing in California and elsewhere are U.S. citizens or voters—matters on which the record is silent. While intrastate redistricting is governed by the Equal Protection Clause's "one person, one vote" principle, interstate congressional apportionment is governed by Section 2 of the Fourteenth Amendment, which provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the *whole number of persons in each State*, excluding Indians not taxed." U.S. Const. amend. XIV, § 2 (emphasis added). Thus, while a nonvoter might or might not have standing to challenge a *district* on a representational dilution theory under the Equal Protection Clause—an open question, however much common sense might suggest the answer is "yes," *see, e.g.*, *Calvin v. Jefferson Cty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1307 n.12 (N.D. Fla. 2016)—the "undoubted[]" Article III injury that a person suffers when his or her *state* loses a representative in congressional reapportionment, *Department of Commerce*, 525 U.S. at 331, ultimately traces to a legally protected interest that does not depend on that person's citizenship status or eligibility to vote. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1127-28 & n.9 (2016) (describing the original understanding of population-based apportionment, which James Madison called a "fundamental principle of the proposed constitution," as reflecting Alexander Hamilton's "principled argument for allocating seats to protect the representational rights of every individual of the community at large," and describing the understanding of the Fourteenth Amendment's framers that "non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot" (citations and internal quotation marks omitted)).

seat in the next Congressional reapportionment because of the citizenship question's addition to the 2020 Census. *See* Recitation of Facts ¶¶ 243, 245. New York and Illinois *are* Plaintiffs here, and thus have standing to seek a remedy for that injury in their own right. *Cf. Evans*, 536 U.S. 452. Additionally, that provides an independent basis for ADC and MRNY to seek relief, as ADC has individual members who reside in New York and Illinois, *see* Recitation of Facts ¶ 257, and MRNY has individual members who reside in New York, *see id.* ¶ 256. ADC's individual members who reside in Texas, Arizona, and Florida, *see id.* ¶ 257, likewise face a substantial risk of lost representation in the U.S. House of Representatives.

A closer question is whether Plaintiffs have also proved that any of the NGO Plaintiffs' members will suffer an Article III injury in fact in the form of lost representation in *intra*state redistricting carried out on the basis of the federal decennial census. Intrastate vote dilution plainly qualifies as an injury in fact for purposes of Article III. *Dep't of Commerce*, 525 U.S. at 332-33; *Carey*, 637 F.2d at 838. In *Department of Commerce*, for example, the Supreme Court held—given the fact that certain counties "were substantially likely to lose population" under the Census Bureau's plan—that residents of those counties had satisfied Article III's injury-in-fact requirement. 525 U.S. at 334. In other words, all the Court required was proof that (1) certain states relied on federal decennial census data for intrastate redistricting, (2) voters in certain counties in those states were "substantially likely . . . to suffer vote dilution as a result of the [Census Bureau's] plan," and (3) plaintiffs were among the voters who lived in those counties in those states. *Id.*

at 332-34 (internal quotation marks omitted). As that language suggests, however, the Supreme Court has tended to describe the injury in the *intra*state vote-dilution context as affecting only eligible voters. Here, Plaintiffs have proved that several of the NGO Plaintiffs' individual members *reside* in counties that will lose statewide population shares because of the citizenship question, but the record is silent as to whether those members are also eligible voters. In this instance, the Court concludes that the interests of avoiding an unnecessary holding on a delicate constitutional question outweigh even the powerful interests favoring resolution of all open legal issues in this Opinion. *See Ashwander*, 297 U.S at 347 (Brandeis, J., concurring). The Court therefore declines to address whether the facts proved by Plaintiffs are legally sufficient to establish that any of the NGO Plaintiffs' members will suffer an Article III injury when, at a minimum, they lose political representation in the next intrastate redistricting.

b. Loss of Government Funds

Second, given the Court's factual findings, many Plaintiffs have proved that they will suffer a loss of funding from federal programs that distribute such funding on the basis of census data. Such a monetary loss is a classic form of Article III injury in fact. *See Carey*, 637 F.2d at 838 (holding that "citizens who challenge a census undercount on the basis . . . that improper enumeration will result in loss of funds to their city have established . . . an injury" for purposes of standing); *accord City of Detroit v. Franklin*, 4 F.3d 1367, 1374-75 (6th Cir. 1993); *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 671 (E.D. Pa. 1980);

City of Camden v. Plotkin, 466 F. Supp. 44, 47-51 (D.N.J. 1978). More specifically, a state or locality that proves that it will lose funds under federal revenue-sharing programs satisfies Article III's injury-in-fact requirement. *See Carey*, 637 F.2d at 838 ("New York City and New York State . . . have standing as recipients of federal funds under revenue sharing."). So too, an individual who proves that he or she will suffer a loss of federal benefits has adequately proved an Article III injury. *See id.* ("The individual plaintiffs in this case have alleged concrete harm in the form of . . . decreased federal funds flowing to their city and state, thus establishing their standing.").

Applying those principles here, the Court concludes as follows:

- Plaintiffs Illinois, Massachusetts, Maryland, New Jersey, New Mexico, New York, Oregon, Washington State, and the District of Columbia have proved that if the net undercount of noncitizens attributable to the citizenship question is as low as two percent—far lower than the Court has found to be the best estimate—they will lose funds from several federal programs. *See* Recitation of Facts ¶¶ 251-52. On that basis, the Court concludes that those Plaintiffs face "certainly impending" injuries.
- Plaintiffs have also proved that (1) MRNY's individual members who reside in New York and (2) ADC's individual members who reside in California, Texas, Florida, Nevada, and Hawaii, and in Plaintiff States New York and New Jersey, face a "certainly impending" Article III in-

jury for the same reasons. *See* Recitation of Facts ¶¶ 256-67.

- Additionally, Plaintiffs have proved that MRNY's individual members who reside in New York and benefit from Title I and Head Start funds will suffer an individualized harm that is "certainly impending," in light of its propensity to occur in even the most implausibly low noncitizen net undercount scenarios. *See* Recitation of Facts ¶ 256.

- Finally, Plaintiffs have proved that NYIC's members Chhaya, LSA, Korean Community Services of Metropolitan New York, Planned Parenthood of New York City, and Chinese-American Planning Council all receive funding through programs that allocate funds to states based on census data. *See* Recitation of Facts ¶ 258. Given the net undercount scenarios that the Court has found to be likely, those organizations have proved that they face a substantial risk of an Article III injury in the form of lost funding.

Defendants argue that, even if Plaintiffs have proved these losses are likely to occur, they do not count as Article III injuries because they may be "offset" by gains that turn up elsewhere in the federal funding scheme. *See* Tr. 506; Defs.' Post-Trial Br. 34-36, ¶¶ 220-38. But "the fact that an injury may be outweighed by other benefits, while often sufficient to defeat a claim for damages, does not negate standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 265 (2d Cir. 2006); *see also Texas v. United States*, 809 F.3d 134, 155-56 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (mem.); *NCAA v. Governor of*

N.J., 730 F.3d 208, 223 (3d Cir. 2013) ("A plaintiff does not lose standing to challenge an otherwise injurious action simply because he may also derive some benefit from it. Our standing analysis is not an accounting exercise. . . . "), *abrogated on other grounds by Murphy v. NCAA*, 138 S. Ct. 1461 (2018); *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44, 53 (S.D.N.Y. 2016).

Plaintiff Colorado will also suffer an injury for a related reason: It will lose the ability to spend funds because its own state constitution limits year-on-year increases in expenditures to a function of the state's population growth as determined by federal census data. The Colorado "Taxpayer's Bill of Rights," ratified into the Colorado Constitution, limits the "maximum annual percentage change in state fiscal year spending" to "inflation plus the percentage change in state population in the prior calendar year, adjusted for revenue changes approved by voters after 1991," and provides that "[p]opulation shall be determined" for that purpose "by annual federal census estimates and such number shall be adjusted every decade to match the federal census." Colo. Const. art. X, § 20(7)(a); *see* Colo. Rev. Stat. § 24-77-103(1)(c)(III) (providing for a formula to recalculate the percentage change each year on the basis of new federal census estimates). Whether characterized as a loss in funding, or a loss in the ability to spend for the general welfare of its residents (and, thus, an infringement on Colorado's sovereign interests), Colorado will suffer an Article III injury if its population is undercounted by even the smallest amount. Given the Court's findings as to the likely net undercount of Colorado's population, *see* Recitation of Facts ¶ 249, the Court concludes that Colorado faces a "certainly

impending" injury traceable to the addition of the citizenship question.

In sum, given the remarkably low net undercount of noncitizens that would prompt the foregoing losses of funding, Governmental Plaintiffs Colorado, Illinois, Massachusetts, Maryland, New Jersey, New Mexico, New York, Oregon, Washington State, and the District of Columbia; and NGO Plaintiffs ADC, MRNY, and NYIC have established an injury in fact that is "certainly impending." At a minimum, there is no doubt that these Plaintiffs have demonstrated a "substantial risk" that they will suffer such injuries. In either case, these Plaintiffs have satisfied Article III's injury-in-fact requirement.

c. Harm to the Quality and Accuracy of Data

Next, the Governmental Plaintiffs proved that they will suffer injury in fact from the degradation in data quality that would occur if the citizenship question appears on the 2020 census. At the outset, there is no reasonable dispute that Plaintiffs proved by a preponderance of the evidence that addition of the citizenship question would result in that harm. Indeed, the evidence at trial was undisputed that, regardless of how successful NRFU operations are in remedying a net differential undercount due to a differential decline in self-response rates, the addition of the citizenship question *will* result in harm to the quality of census data. First, as noted above, that was the original position of the Census Bureau in connection with its review of DOJ's request. *See* Recitation of Facts ¶¶ 8, 19, 28-30, 34. Second, Defendants own expert, Dr. Abowd, agreed, testifying that the addition of a citizenship question would harm the overall quality of 2020 census data

regardless of any net undercount scenario. *See* Tr. 882, 952-53, 1221-22, 1251. And third, Plaintiffs' experts testified credibly in the same manner. Tr. 302-04. Additionally, Dr. Salvo, the Director of the New York City Department of City Planning's Population Division, explained credibly that the degradation in quality of the data would harm New York City's ability to allocate educational and public health resources efficiently and effectively. *See* Recitation of Facts ¶ 263.[50] Crucially, these harms will occur *whether or not there is a net undercount*—meaning that this theory of injury does not depend on the causal chain of events connecting the decline in self-response rates among noncitizen households to a net differential undercount of people who live in such households.

Understandably, then, Defendants raise no objections in their post-trial filings to the imminence, traceability, or redressability of this harm. *See* Defs.' Post-Trial Br. 70, ¶¶ 20-21. Instead, the principal dispute between the parties is whether a degradation in the quality of census data *is* a legally cognizable harm. *Compare id.*, *with* Pls.' Proposed Conclusions ¶¶ 57-59. The Court agrees with Plaintiffs that it is. For starters,

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[50] Defendants contend that Dr. Salvo's testimony about the citizenship question's effects on data quality was too "conclusory" and "lacked key specifics," including that he did not name the precise city services that might be affected by a decline in data quality. Defs.' Post-Trial Br. 40, ¶ 264. At best, Defendants' criticisms amount to little more than nitpicking. Dr. Salvo testified credibly that the City's allocation of resources with respect to several important programs would be harmed by the degradation in data quality attributable to the citizenship question and, moreover, did name specific examples relating to the New York City Board of Education and Department of Health. *See* Recitation of Facts ¶ 263.

the Supreme Court has consistently held that the "inability to obtain information" is a cognizable Article III injury. *FEC v. Akins*, 524 U.S. 11, 21 (1998); *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) ("[R]efusal to permit appellants to scrutinize the ABA Committee's activities to the extent [the Federal Advisory Committee Act] allows constitutes a sufficiently distinct injury to provide standing to sue."); *id.* ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."). If the inability to obtain information is a cognizable form of injury for Article III purposes, it follows *a fortiori* that the inability to obtain accurate information would be as well. After all, there is no interest in obtaining false or faulty information.

To be sure, many of these cases involved statutory entitlements to certain information—the classic example of such an entitlement (although, interestingly, the example least discussed in the context of Article III standing) being the Freedom of Information Act. That is no objection to the conclusion that the Supreme Court has recognized the denial of information as an Article III injury, however, because if such an injury were not already "concrete" enough for Article III purposes, Congress could not make it so. As the Supreme Court recently clarified, "Congress' role in identifying and elevating intangible harms" does not allow it to grant standing on the basis of pure statutory violations—instead, "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1540. Thus, if the claims of informational injury discussed in the cases amounted

to nothing more than "bare procedural violation[s], divorced from any concrete harm," they would not "satisfy the injury-in-fact requirement of Article III," *id.* —but they are more than that, so they do.

Similarly, a state that relies on the information provided by the federal government under an existing statutory arrangement suffers a sufficiently "concrete" and "particularized" injury for purposes of Article III when the federal government degrades the quality of that information. States are sovereign entities with sovereign interests in the making and enforcement of their own laws. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982); *cf. Maryland v. King*, 567 U.S. 1301, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (concluding that Maryland suffered an injury to its "law enforcement and public safety interests" from a lower-court order preventing the state from utilizing DNA samples for law enforcement purposes pursuant to a state statute). But they frequently do so in collaboration with, or in reliance on, the federal government—such is the genius of the federal system, which has historically embraced various creative models of "cooperative federalism." *See, e.g., New York v. United States*, 505 U.S. 144, 167-69 (1992); *Hodel v. Va. Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264, 286-89 (1981). Most relevant here, states have long relied on federal decennial census data for countless sovereign purposes, and many of the State Plaintiffs here even *require* the use of such data by law; in some instances, it is written into their state constitutions.

The most noteworthy examples of this reliance are the State Plaintiffs that mandate the use of federal decennial census data to apportion state representatives.

See, e.g., Recitation of Facts ¶ 246; *see also Georgia*, 539 U.S. at 488 n.2; *Dep't of Commerce*, 525 U.S. at 333 n.4, 334. But state reliance on federal census data for sovereign purposes is goes well beyond that, as the following examples—ranging from the profound to the mundane—make plain:

- States often seek to apportion governmental expenses equitably among local governments, for example, by requiring each county to contribute in proportion to its share of population as calculated by the latest federal decennial census. *See, e.g.*, Colo. Rev. Stat. § 20-1-208 (requiring counties to contribute towards the salaries of employees in Colorado district attorneys' offices according to the counties' population share, as determined in the "last preceding decennial census" of the district in which each county sits); Conn. Gen. Stat. Ann. § 7-338 (requiring that the expenses of a charter commission for a new metropolitan fire, sewer, or water district be apportioned among "each town, city or borough" according to its proportion of the district's total population, "as determined by the last-preceding federal census").
- Other states provide for direct state aid to local governmental units on a per capita basis, relying on federal decennial census data to ensure a fair distribution of resources. *See, e.g.*, 30 Ill. Comp. Stat. 115/2(a) (requiring monthly allocations of the Illinois "Local Government Redistributive Fund" and "Income Tax Surcharge Local Government Distributive Fund" in proportion to cities' and counties' population as determined by

federal decennial census data); Minn. Stat. Ann. § 260.821(1)(b) (requiring that support grants to Indian tribes be apportioned, in part, on the basis of "the ratio of the tribe's on-reservation population to the state's total on-reservation population," as determined by the "most recent federal census data"); R.I. Gen. Laws §§ 23-18.9-1, 23-18.9-3 (requiring that funds appropriated as grants in aid of local refuse disposal services be distributed according to a community's share of the statewide population, according to federal census data); N.Y. State Fin. Law § 54(2) (McKinney) (providing that each fiscal year, "there shall be apportioned and paid to the several counties, cities, towns and villages, from moneys appropriated by the state, for the support of local government" amounts in proportion to their "population"); *id.* § 54(1)(a)(1) (defining "population" to mean "the population as shown by the latest preceding decennial federal census" or a "special population census").

- Some states also redistribute state tax receipts to cities on the basis of each city's population share. *See, e.g.*, Iowa Code Ann. § 312.3(2)(a) (providing that the state treasurer shall, on the first day of each month, "[a]pportion among the cities of the state, in the ratio which the population of each city, as shown by the latest available federal census, bears to the total population of all such cities in the state, the percentage of the road use tax funds which is credited to the street construction fund of the cities"); N.M. Stat. Ann. § 7-1-6.26(C) (providing that counties shall receive a share of the "county government road

fund" calculated in part based on the county's population "as shown by the most recent federal decennial census"); Or. Rev. Stat. § 221.770 (requiring that certain liquor revenues be apportioned among Oregon's cities in part based on their population as determined by federal census data).

- North Carolina apportions state support to community colleges in part based on a formula that takes into account ratios of county and area populations as determined by the "latest United States census." N.C. Gen. Stat. § 115D-31(a)(3).
- Pennsylvania sets the maximum salary for the mayor of any city with a population greater than 15,000 at "$500 per every thousand residents per year as determined by the most recent census data provided by the United States Census Bureau." 11 Pa. Cons. Stat. § 11208(a), (b). It also sets the maximum "tapping fee" that a sewer or water authority may charge a property owner who connects to the authority's sewer or water system as a function of the average household size "as established by the most recent census data provided by the United States Census Bureau." 53 Pa. Cons. Stat. § 5607(d)(24)(i)(C)(V)(e).
- Some states more generally define "population" for the purpose of their laws to mean population as calculated in the most recent federal decennial census. *See, e.g.*, Iowa Code Ann. § 9F.6 ("Whenever the population of any county, township or city is referred to in any law of this state, it shall be determined by the last preceding certified federal census unless otherwise provided.");

> N.Y. Gen. Constr. Law § 37-b (McKinney) ("The term population when used in relation to this state . . . shall, unless otherwise provided in relation to such use, mean population as shown by the latest federal census published as a final population count by the United States bureau of the census."); Va. Code Ann. § 1-235 ("'Population' or 'inhabitants' means with reference to any county, city, town, political subdivision of the Commonwealth or any combination thereof, the natural persons in such county, city, town, political subdivision or combination as shown by the unadjusted United States decennial census. . . . ").

Meanwhile, it is, of course, the federal government's job to collect and distribute accurate federal decennial census data. *See* U.S. Const. art. I, § 2, cl. 3; *see also Utah*, 536 U.S. at 478 (explaining that the Framers had a "strong constitutional interest in [the] accuracy" of the census); *Wisconsin*, 517 U.S. at 20 (holding that the conduct of the census must bear a "reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," namely, obtaining an accurate count of the population in each state); Pub. L. No. 105-119, § 209(a)(6), 111 Stat. at 2481 ("Congress finds that . . . [i]t is essential that the decennial enumeration of the population be as accurate as possible, consistent with the Constitution and laws of the United States."). When the federal government degrades the quality of that data, it therefore inflicts a

cognizable injury on the sovereign interests of reliant states.[51]

An example may be helpful in illustrating the point. Suppose a state were to premise certain of its policies on a person's lawful presence in the United States—for example, suppose that it chose to deny certain benefits to undocumented immigrants or required its law-enforcement officials to inquire into the immigration status of any person detained in state custody for any reason. "The accepted way" for states "to perform [such] status checks"—and surely the most reliable—is to contact the DHS' Immigration and Customs Enforcement ("ICE"), the federal agency that accepts and responds to such inquiries from interested states. *Arizona v. United States*, 567 U.S. 387, 411 (2012). Now suppose that ICE were to degrade the quality of its data set, thereby undermining its usefulness to the state as a tool for implementing its policy priorities. If this hypothetical state were to challenge the decisions causing the degradation in immigration-status data, the federal agency could certainly defend its actions on the grounds that they were lawful. But could it seriously deny that the state had suffered a cognizable injury for purposes of standing? Surely not.

Indeed, ample case law supports the proposition that a state has a strong sovereign interest in conducting its own policy, the burdening of which causes an

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[51] That does not mean that, in every case, a state will have a "right" to such data—or a right to data of a certain quality—sufficient to support a valid cause of action to obtain it. But it does mean that a state suffers a concrete and particularized injury when the federal government degrades important tools of sovereignty—or takes those tools away altogether.

injury in fact for Article III purposes. One such sovereign interest is a state's "exercise of sovereign power over individuals and entities within [its] jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son*, 458 U.S. at 601. Another such sovereign interest—which, in light of the frequent prohibition on *parens patriae* suits against the federal government, *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923), is "distinct from . . . the general well-being of its residents" —is a state's "interest in securing observance of the terms under which it participates in the federal system," *Alfred L. Snapp & Son*, 458 U.S. at 607-08; *cf. Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes."); *Diamond v. Charles*, 476 U.S. 54, 65 (1986) ("Because the State alone is entitled to create a legal code, only the State has the kind of 'direct stake' . . . in defending the standards embodied in that code.").

The Fifth Circuit's decision in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016), is instructive on this front. In that case, Texas led a coalition of states in a challenge to the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents program ("DAPA"). The Court held that the states had suffered a cognizable injury for purposes of standing because DAPA would have entitled its recipients to obtain driver's licenses under existing state law and providing those licenses would have come at a financial cost to Texas. *See id.* at 155-56. In denying a stay of the district court's preliminary injunction pending appeal, the Fifth Circuit

cited *Alfred L. Snapp & Son*, explained that Texas possessed a sovereign interest in the maintenance of its own legal code, and held that "Texas's forced choice between incurring costs and changing its laws is an injury because those laws exist for the administration of a state program, not to challenge federal law, and Texas did not enact them merely to create standing." 787 F.3d 733, 749 (5th Cir. 2015). The court reasoned that "if pressure to change state law in some substantial way were not injury, states would have no standing to challenge *bona fide* harms because they could offset most financial losses by raising taxes or fees." *Id.* Several months later, the Fifth Circuit affirmed the preliminary injunction on the merits, reiterating and confirming its conclusions as to standing. The Circuit held that "states may have standing based on . . . federal interference with the enforcement of state law, at least where the state statute at issue regulates behavior or provides for the administration of a state program and does not simply purport to immunize state citizens from federal law." 809 F.3d 134, 153 (alterations and internal quotation marks omitted). Such "intrusions," the court explained, "are analogous to pressure to change state law." *Id.*

Like the state plaintiffs in *Texas v. United States*, the State Plaintiffs here have enacted their reliance on federal census data into law—in some cases, as noted, even into their constitutions. Moreover, as in *Texas v. United States*, "there is no allegation," let alone proof, that those jurisdictions enacted their laws or ratified their constitutions "to manufacture standing" in these cases. *Texas*, 809 F.3d at 159. If a citizenship question is added to the decennial census, these Plaintiffs will be subjected to a forced choice: They can use the

degraded data, resulting in worse policy; they can spend money to compensate for the damage; or they can change their laws to relieve themselves of the legal obligation to use federal census data in making and enforcing their laws (which would presumably necessitate the expenditure of additional resources to collect data of their own anyway). Such "pressure[] to change state law constitutes an injury" within the meaning of Article III. *Texas*, 787 F.3d at 749; *see Texas*, 809 F.3d at 153.

Accordingly, several Governmental Plaintiffs—including State Plaintiffs New York, Colorado, Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Virginia, and Washington, and Plaintiff New York City—have proved an imminent injury to their sovereign interests through the degradation in quality of federal census data.

d. Diversion of Resources

Next, the Court finds that the NGO Plaintiffs have established that they have already suffered, and will continue to suffer, injury in fact due to a diversion of their resources. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Supreme Court held that an organization can establish Article III injury in fact by proving "concrete and demonstrable injury to [its] activities—with the consequent drain on [its] resources." *Id.* at 379; *see id.* at 379 n.21 (holding that an organization that proves it "has indeed suffered impairment" in its activities has proved an Article III injury); *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011) (requiring a showing of "perceptible impairment"); *see also Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 904-06 (2d Cir. 1993). Although an organization may not

inflict such an "impairment" on itself for purposes of creating standing—for example, by incurring litigation expenses in the very lawsuit at issue, *see, e.g.*, *Citizens for Responsibility and Ethics in Wash. v. Trump*, 276 F. Supp. 3d 174, 189-93 (S.D.N.Y. 2017) ("*CREW*")—the *Havens Realty* theory of organizational standing squarely covers a claim of injury from "purportedly illegal action [that] increases the resources the group must devote to programs independent of its suit challenging the action." *Spann v. Colonial Vill., Inc.*, 899 F.2d 24, 27 (D.C. Cir. 1990) (R.B. Ginsburg, J.); *see CREW*, 276 F. Supp. 3d at 190 (noting that *Havens Realty* applies where the "[d]efendant's actions have impeded" an organization's "ability to perform a particular mission-related activity, or [forced it] to expend resources to counteract and remedy the adverse consequences or harmful effects of [the] [d]efendant's conduct"). This is exactly the kind of injury that NGO Plaintiffs allege here.

Defendants suggest that *Havens Realty* recognizes Article III injuries arising from organizational expenditures, but only where those expenditures are made in response to injuries that are *themselves* sufficiently imminent and impending to satisfy Article III. *See* Defs.' Post-Trial Br. 69, ¶ 15; Tr. 1486-89. Of course, that argument is beside the point because Plaintiffs have proved such injury, as discussed above. But the argument also makes no sense on its own terms. It would be illogical to recognize that organizations may be injured by expenditures made in response to future injuries, as the Supreme Court continues to do, *see Clapper*, 568 U.S. at 414 n.5, but to hold that that doctrine applies only in cases in which it would be superfluous. Indeed, that would render the category of

plaintiffs that could establish standing under a *Havens Realty* theory a null set. Conspicuously, though, Defendants cite no Supreme Court case holding (or even hinting) that *Havens Realty* has been so cabined, much less overruled.

Applying *Havens Realty* here, the Court finds that the NGO Plaintiffs plainly have standing to challenge Secretary Ross's decision. That is, all four NGO Plaintiffs have proved that the citizenship question will cause them—indeed, already is causing them—to divert organizational resources away from their core missions and towards combating the negative effects of the citizenship question. *See* Recitation of Facts ¶¶ 265-74.[52] Defendants' arguments to the contrary are somewhat ironic because the record makes clear that the Census Bureau itself relies on organizations like the NGO Plaintiffs to ensure a successful census—and will rely on them to counteract the indisputably negative effects of the citizenship question. *See, e.g.*, Recitation of Facts ¶¶ 187-88, 274. In fact, Dr. Abowd, Defendants' own expert, explicitly conceded that addition of the citizenship question on the census will make the "job[s]" of these organizations "harder." Tr. 1303-05. In other words, Defendants' own arguments against the NGO

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[52] Some of the NGO Plaintiffs cite expenses related to this litigation among the resources that they have expended because of the citizenship question. *See, e.g.*, Altschuler Decl. ¶ 22. A claim of injury predicated on litigation expenses alone, however, would stand on shaky ground. *See CREW*, 276 F. Supp. 3d at 189-93. Given that the NGO Plaintiffs' injuries involve diversion of resources *other* than mere litigation expense, *see, e.g.*, Altschuler Decl., ¶¶ 19-21, the Court need not and does not rely on litigation expenses in reaching its conclusions that the NGO Plaintiffs have proved injury in fact.

Plaintiffs' injury depend on their prediction that any impending decline in self-response rates will be mitigated, in part by organizations such as the NGO Plaintiffs that will spend money and devote organizational resources to combat the citizenship question's negative effects. Defendants' own arguments against Plaintiffs' other theories of standing therefore serve to confirm this one.

In contending that the NGO Plaintiffs have not proved this theory of injury, Defendants also fault the NGO Plaintiffs for the lack of any testimony "that their expenditure of resources took into account the extent to which the Census Bureau's [NRFU] procedures would mitigate any differential net undercount attributable to the citizenship question." Defs.' Post-Trial Br. 40, ¶ 262. In other words, Defendants suggest that Plaintiffs should be denied standing to seek a remedy in federal court because they should have trusted the same parties who caused their injuries in the first place to fix them. That may be the kind of thing the fox would say to the henhouse, but it is not what one would expect the federal government to say to a coalition of civil rights organizations challenging what they believe to be unlawful governmental action. In any event, the argument is unpersuasive on its merits, too, as it has a circular quality: As noted above, Defendants' own efforts to mitigate a decline in self-response depend in part on organizations like the NGO Plaintiffs expending resources to counteract such a decline. That is, to the extent that Defendants' NRFU efforts are successful in any respect, it will be in part because the NGO Plaintiffs have expended resources in aid of those efforts. And in any event, the Court has already found, based on the evidence at trial, that Defendants' NRFU

efforts will *not* succeed in eliminating a net differential undercount as a result of the citizenship question.

Defendants' only remaining objection to this theory of injury is without merit. They assert that the NGO Plaintiffs have "not met their burden of proving" a "direct conflict between their missions and the reinstatement of a citizenship question on the census." Defs.' Post-Trial Br. 40, ¶ 263; *see id.* at 69-70, ¶ 18. In support of that conclusion, however, they rely on a misreading of the D.C. Circuit's decision in *National Law Center on Homelessness & Poverty v. Kantor*, 91 F.3d 178 (D.C. Cir. 1996). In that case, an organization dedicated to helping the homeless asserted Article III standing to challenge an undercount of homeless individuals based on an anticipated injury to the organization's "purpose of providing accurate information on homelessness and poverty." *Id.* at 182. But the D.C. Circuit did not accept that characterization of the organization's mission; pointing out that the National Law Center was not a "news reporting agency," the Court observed instead that the "purpose of providing" such "accurate information" was "ancillary to [its] general approach of gaining governmental responses to improve the lot of the homeless." *Id.* Given that definition of the organization's mission, the "indirectness" that the court found to be problematic in that case is easy to see. It is equally easy to see that it is *not* present here.

More significantly, the D.C. Circuit went on to hold that the connection between the ability to disseminate accurate information about the homeless population and the probability of achieving tangible benefits based on the public's reaction to that information was "at the

far end of speculation" on the factual record before it. *Id.* Observing that "conjectural" connection, the Court held that it was "[f]or *this* reason" that the organization's reliance on *Havens Realty* was "misplaced"—that is, that the group had simply failed to show, as a factual matter, that "a homeless undercount . . . impose[d] any . . . barriers to either the homeless or their advocates." *Id.* (emphasis added); *see Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entm't*, 659 F.3d 13, 25 (D.C. Cir. 2011) (construing the "direct conflict" requirement to mean that "[i]f the challenged conduct affects an organization's activities but is neutral with respect to its substantive mission," it is "'entirely speculative' whether the challenged practice will actually impair the organization's activities"). Here, of course, Plaintiffs have proved, as a factual matter, that Defendants' conduct will—absent an expenditure of resources—harm their core missions of advancing the interests, and enhancing the political power, of the communities they serve. There is thus a "direct conflict" between their missions and the conduct they challenge, and they have proved an Article III injury under *Havens Realty*.

Finally, Plaintiffs have also proved that New York City and Chicago have diverted limited resources towards counteracting the injurious effects of a citizenship question. That forced resource-diversion also qualifies as an Article III injury. It is long settled that a municipality that loses access to resources, thus "threatening its ability to bear the costs of local government and to provide services," suffers an Article III injury in fact. *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 110-11 (1979). And it is of no import that New York City and Chicago could, theoretically, have

foregone any efforts to remedy the harms caused by the citizenship question, as the "forced choice" between risking imminent harm and spending money to avoid it would constitute a cognizable Article III injury all by itself. *Cf. Texas*, 787 F.3d at 749.

Accordingly, Plaintiffs ADC, MRNY, NYIC, CASA, New York City, and the City of Chicago have each proved that the addition of a citizenship question to the 2020 census questionnaire will cause, and in some instances has already caused, cognizable Article III injury in the form of a diversion of valuable resources.

e. Loss of Privacy

Finally, the Court shares Plaintiffs' view that any "invasion of privacy" that would be inflicted by the unlawful disclosure of confidential census data regarding individuals' citizenship status would, it if were sufficiently imminent, constitute a cognizable Article III injury. A contrary view would fly in the face of "both the common law and the literal understandings of privacy," which "encompass the individual's control of information concerning his or her person." *U.S. Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989). That said, Plaintiffs did not prove that such an injury is sufficiently imminent to satisfy Article III in these cases. As Plaintiffs concede, it would be illegal for the Department of Commerce to "make any publication whereby the data furnished by any particular establishment or individual . . . can be identified." 13 U.S.C. § 9(a)(2); Pls.' Proposed Findings ¶ 1722. Consistent with that mandate, Dr. Abowd testified at trial that the Census Bureau will apply "disclosure avoidance techniques" to any data to ensure that information concerning particular respondents is

not identifiable. Tr. 1033. To be sure, those techniques may reduce the fitness of the data for DOJ's purposes—an issue addressed below. And, in theory, the statutory prohibition could be changed by a future Congress. But it is pure speculation to suggest that the Census Bureau will not comply with its legal obligations to ensure the privacy of respondents' data or that those legal obligations will be amended. And given that, the fact that NGO Plaintiffs may be subjectively fearful that the government will misuse citizenship data obtained through the census, *see* Pls.' Proposed Conclusions ¶ 55, however understandable such fears may be, is "insufficient to create standing," *Clapper*, 566 U.S. at 417. Accordingly, the Court holds that Plaintiffs failed to prove that they have been, or will be, injured for Article III purposes through a loss of privacy.

3. Traceability and Redressability

In short, Plaintiffs proved that some have suffered, or will suffer, injury in fact in at least four ways: (1) diminished political representation, between and within states; (2) reductions in federal funding, again both between and within states; (3) harm to the accuracy and quality of census data; and (4) the diversion of resources. Thus, the Court turns to the second element of standing, which requires that Plaintiffs prove a "causal connection" between their injuries and the conduct they challenge in this lawsuit. *Lujan*, 504 U.S. at 560.

Plaintiffs have done so here. First, the evidence at trial proved beyond any doubt, and certainly by a preponderance of the evidence, that the addition of a citizenship question will cause a disproportionate decline in self-response rates among households containing at

least one noncitizen individual and that that, in turn, will force substantially more such households into the Census Bureau's NRFU process. Right off the bat, that will cause a decline in the accuracy and quality of the data generated by the census, which will injure the Governmental Plaintiffs that rely on that data to make and enforce their laws. On top of that, the Court found, by a preponderance of the evidence, that the decline in self-response will translate into a net differential undercount of people who live in noncitizen households of at least 5.8%. That net differential undercount will, in turn, cause the harms set forth in the prior section of this Opinion. In arguing otherwise, Defendants attack the "traceability" of Plaintiffs' injuries to the citizenship question in startlingly cursory fashion. After previewing these arguments with such fanfare, *see* Defs.' Pre-Trial Br. 6 n.2; *see generally id.* at 5-20, Defendants devote a scant two paragraphs of their Proposed Conclusions of Law to contesting "traceability" on various grounds, each of which amounts to little more than a conclusory citation to the record, and each of which—even lending it the most charitable interpretation, despite Defendants' near-abandonment of their supporting arguments—is ultimately unavailing. *See* Defs.' Post-Trial Br. 70-71, ¶¶ 22-23.

The first such ground is the most familiar: Defendants argue that the connection between the citizenship question and Plaintiffs' injuries is simply too "speculat[ive]," relying on too many "inferences" to satisfy Article III. Post-Trial Br. 67-68, ¶¶ 11-14.[53] That

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[53] Notably, Defendants raise this argument as an objection to the *imminence*—as opposed to the traceability—of only two types of injuries, namely lost political representation and lost federal fund-

argument, however, misunderstands both the law and the facts. Courts often dismiss claims for prospective relief because the plaintiffs' claims that defendants will imminently cause them injury are too "speculative" to satisfy Article III. *See, e.g., Clapper*, 568 U.S. at 410-14. But, as the term suggests, the bar on "speculative inferences" in the standing analysis refers to *speculation* and *inferences*, as opposed to evidence and proof. To be sure, at the pleading stage, a plaintiff must plausibly allege facts connecting his or her injuries to the defendant's conduct, and cannot substitute "speculative inferences" for plausible factual allegations of causation. *See, e.g., Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 42-46 (1976) (ordering dismissal of a complaint that failed to allege that plaintiffs' injuries "*in fact* result[ed] from" a challenged federal tax incentive through its effect on third parties, rendering it "purely speculative" whether those injuries were fairly traceable to the tax incentive "or instead result[ed] from decisions made" by the third parties "without regard" to the incentive (emphasis added)). But here, with a full trial record, the Court need not speculate: Plaintiffs *proved* each factual step in the causal chain and that each step is fairly traceable, at least in part, to the addition of a citizenship question. *See, e.g., Mendia v. Garcia*, 768 F.3d 1009, 1012-13 (9th Cir. 2014) ("[W]hat matters is not the length of the chain of causation, but rather the plausi-

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ing. Defs.' Post-Trial Br. 67-68, ¶¶ 11-14. But for the Court's independent obligation to assure itself of its own subject-matter jurisdiction, the Court would deem the objection abandoned as it relates to traceability—and perhaps Defendants meant to do just that, given the ultimate weakness of the argument. The Court addresses the "imminence" of Plaintiffs' injuries in more detail below.

bility of the links that comprise the chain." (internal quotation marks omitted)). So, while "highly attenuated chain[s] of *possibilities*" are not enough to survive a motion to dismiss, *Clapper*, 568 U.S. at 410 (emphasis added), here the Court deals with facts, not possibilities. Because the facts show both that Plaintiffs' injuries are imminent and fairly traceable to Defendants' conduct, this is not a case in which "[s]peculative inferences are necessary to connect [Plaintiffs'] injury to the challenged actions of [Defendants]." *Simon*, 426 U.S. at 45. Indeed, the facts underlying the chain of causation connecting Defendants' conduct to Plaintiffs' injuries here is far stronger than those the Supreme Court found sufficient in *Davis*.

In fact, to the extent that either side in these cases invites the Court to substitute "speculation" for proof, it is *Defendants*, not Plaintiffs, who do so. Defendants assert that NRFU operations will remedy any decline in the self-response rate attributable to the citizenship question, Defs.' Post-Trial Br. 16-20, ¶¶ 127-141, but, at the end of the day, they offer little more than a hope and prayer in support of that assertion. As discussed, NRFU operations have historically failed to remedy differential declines in self-response rates. *See* Recitation of Facts ¶¶ 211, 230. And Defendants offer no evidence in support of their claim that NRFU operations will do so this time; indeed, they have not even determined the imputation formulae that they will use in the 2020 census. *See* Tr. 1350-51. As a matter of fact, and as discussed at length above, there are several demonstrable reasons to believe that NRFU operations will do a *worse* job this time around than in past years in addressing any decline in response rate among Hispanic and noncitizen households. Considerable testi-

mony supports the conclusion that NRFU will suffer from many of the same defects as the initial attempts to obtain answers through self-response. Dr. Hillygus testified that "all of the issues . . . with respect to confidentiality concerns associated with the citizenship question that the Census Bureau acknowledges and has shown to have an impact on the self-response, all matter for cooperation with a census enumerator" in NRFU, too. Tr. 97; *see id.* at 99-100 (discussing the likelihood that confidentiality concerns and the macroenvironment will hamper NRFU efforts more than in previous years). Dr. Barreto's testimony supports the same conclusion, *see* Tr. 643-44, and also suggests that attempts to reassure potential NRFU respondents with confidentiality concerns will be disproportionately less effective for Hispanic and immigrant populations. Tr. 688. Notably, these opinions were based in part on the Census Bureau's own conclusions and studies. *See* Brown Memo at 43 n.60; *see also* PX-152; PX-662; PX-663. On top of that, it is undisputed that NRFU operations do nothing to address an undercount attributable to households that do self-respond but omit noncitizen members from those responses, Tr. 1309-10, a phenomenon that is substantially likely to rise in direct response to a citizenship question appearing on the census questionnaire, *see* Recitation of Facts ¶ 214. In short, Plaintiffs proved that they will imminently suffer a variety of harms that are fairly traceable to Secretary Ross's decision; Defendants' unsupported assertion that they will cure or mitigate those injuries before they materialize, supported by nothing more than a promise—and contradicted by both history and expert testimony about the conditions of the 2020 census—is not enough to render Plaintiffs' injuries "specula-

tive." *Cf. Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 78 (1978) (noting, in the context of discussing traceability and redressability, that a plaintiff need not "negate . . . speculative and hypothetical possibilities in order to demonstrate the likely effectiveness of judicial relief"); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 950 (9th Cir. 2002) ("It would be inequitable in the extreme for us to permit one party to create a significantly increased risk of harm to another, and then avoid [sic] the aggrieved party from trying to prevent the potential harm because the party that created the risk promises that it will ensure that the harm is avoided[.]").

Defendants' second argument—and the one they come closest to abandoning (as it appears only in their proposed findings of fact)—is that the decline in self-response rates among Hispanic and noncitizen households is not "fairly traceable" to the addition of a citizenship question alone because it may also be traceable to an alternate cause, namely the "macroenvironment" of fear and distrust of government among the Hispanic and noncitizen populations. *See* Defs.' Post-Trial Br. 41-42, ¶¶ 272-76. But this is not how the "traceability" requirement works. A plaintiff must "demonstrate *a* causal nexus between the defendant's conduct and the injury" to satisfy Article III's traceability requirement —nothing more. *Rothstein*, 708 F.3d at 91 (emphasis added). And in these cases, overwhelming evidence (much of it from the Census Bureau itself and Defendants' own expert witness, Dr. Abowd) supports the Court's factual finding that Hispanic and noncitizen households will be less likely to respond to the 2020 census questionnaire if it includes such a question. That means that the addition of a citizenship question will—

obviously—be a "but for" cause of the decline in self-response rates among those communities. It may well be true (and indeed, the trial evidence suggests) that adding a citizenship question in the current "macroenvironment" will lead to a *greater* decline than it would in another "macroenvironment." But it would be perverse to suggest that merely because the background context for Secretary Ross's decision will *exacerbate* its negative effects, that the decision is somehow not itself a cause of those effects. Even in a dry season, it is fair to trace the fire to the arsonist.

Defendants' contrary argument—that the decline in self-response will be traceable to the macroenvironment, not the citizenship question—implies that Article III permits only one legally responsible cause per injury. But that is not even how the concept of "proximate" cause works, much less how the "fairly traceable" requirement works. An event can have more than one proximate cause, *see, e.g.*, *Staub v. Proctor Hospital*, 562 U.S. 411, 420 (2011), and each proximate cause need not always even be a *sufficient* cause.[54] And in any event, "proximate cause" is "not a requirement of Article III standing." *Lexmark Int'l*, 572 U.S. at 134 n.6. While the fact that there is another cause "of the plaintiff's injury may foreclose a finding of proximate cause," it "is not necessarily a basis for finding that the injury is not 'fairly traceable' to the acts of the defendant." *Rothstein*, 708 F.3d at 92; *see also Block*, 793 F.2d at 1309. Indeed, the Supreme Court's cases

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[54] Thus, for example, "[s]trike one, strike two, [and] strike three" are "all proximate causes of the strikeout." Oral Arg. Tr. 69, No. 16-980, *Husted v. A. Philip Randolph Institute* (U.S. Jan. 10, 2018) (Kagan, J.), *available at* 2018 WL 353954.

imply an even more expansive traceability bar than the one Plaintiffs have cleared here: that a defendant's conduct need *only* be a "but-for" cause of a plaintiff's injuries in the sense that its removal from the causal chain, through the relief sought in the action, will be likely to redress the injuries. *See Watt v. Energy Action Ed. Foundation*, 454 U.S. 151, 161 (1981) (stating that a plaintiff must "show that there is a 'fairly traceable' causal connection between the injury it claims and the conduct it challenges, *so that if the relief sought is granted, the injury will be redressed*" (emphasis added) (citation omitted)); *Duke Power Co.*, 438 U.S. at 74-78 (concluding that an injury "fairly can be traced to the challenged action of the defendant" if it is a "but-for" cause of the injury and thus likely to be redressed by the relief sought (internal quotation marks omitted)).

Next, Defendants make much of the fact that some steps in the causal chains involve the actions of third parties—namely, those who choose not to self-respond to the census because of the citizenship question's presence on the questionnaire. It is certainly true that traceability can be destroyed where the "*independent* actions of third parties" are responsible for a plaintiff's injuries. *Lujan*, 504 U.S. at 562 (emphasis added). But as Justice Alito's opinion in *Davis* makes clear, *see* 554 U.S. at 734-35, where record evidence, statistical analysis, or just plain common sense support a finding, as they do here, that third parties will respond to the challenged government conduct in a predictable way, "traceability" is *not* defeated. In the words of then-Judge Scalia, "[i]t is impossible to maintain, of course, that there is no standing to sue regarding action of a defendant which harms the plaintiff only through the reaction of third persons." *Block*, 793 F.2d at 1309. If

Defendants' argument were true, he continued, it would be "difficult to see how libel actions or suits for inducing breach of contract could be brought in federal court" or "how state threats and intimidation directed at the distributors of certain books could confer standing upon the publisher whose sales are affected." *Id.* Put simply, the "fairly traceable" standard rules out injuries produced by the "independent choices of third parties" only where those choices are truly "unfettered," *Lujan*, 504 U.S. at 562—that is, *causally* independent from the challenged conduct. Article III "requires no more than *de facto* causality," *Block*, 793 F.2d at 1309, which the presence of third parties in the causal chain does not necessarily undermine, *see Glavin v. Clinton*, 19 F. Supp. 2d 543, 550 (E.D. Va. 1998) (three-judge court) (permanently and universally enjoining the Secretary of Commerce's decision to use statistical sampling in enumerating the population for apportionment purposes, despite the presence of third-parties' "intervening" actions in the chain of causation leading to the plaintiffs' injuries), *aff'd*, *Dep't of Commerce*, 525 U.S. 316. The only question is whether, as a matter of fact, Plaintiffs' injuries are "fairly traceable" up the causal chain to Defendants' conduct. Here, for the reasons explained above, they are.

Perhaps recognizing the weakness of their general arguments regarding the intervening acts of third parties, Defendants renew an argument that they first pressed in their motion to dismiss: that Plaintiffs cannot prove traceability here because the chain of causation depends on the intervening acts of third parties that are *unlawful*. *See* Docket No. 155, at 19-21; Defs.' Pre-Trial Br. 6 n.2; Tr. 1497, 1503. Defendants' argument—for which they cite no supporting authority,

from the Supreme Court or otherwise—may deserve points for creativity, but it gives way under the strain of only a little thought. For one thing, the purpose of standing doctrine is to "ensure[] that courts exercise power that is judicial in nature"—that is, the power to adjudicate "cases" and "controversies" that Article III confers on the judicial branch (and keeps away from the other branches). *Gill*, 138 S. Ct. at 1930 (internal quotation marks omitted); *accord Spokeo* 136 S. Ct. at 1547; *see* U.S. Const. art. III, § 2. Congress can instruct the courts *not* to exercise judicial power over certain cases or classes of cases, *see, e.g.*, *Patchak v. Zinke*, 138 S. Ct. 897, 910 (2018), but it cannot change what the Constitution says the judicial power is. Thus, while declaring one of the intervening steps in a causal chain to be unlawful might affect the underlying merits of a given claim, it would not, and could not, change whether adjudicating that claim qualified as an exercise in the "judicial power" as defined by Article III.

Defendants' argument appears also to suffer from a common confusion between the standing and merits inquiries, which—of course—are conceptually distinct. *See, e.g.*, *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing in no way depends on the merits of [the plaintiff's] contention that particular conduct is illegal." (internal quotation marks omitted)). The question whether Plaintiffs' injuries are "fairly traceable" to Defendants' conduct is not a merits inquiry, as for example the question of proximate causation in tort liability would be; with respect to the latter, Defendants would surely have a colorable argument that they should not be held *liable in damages* for the unlawful intervening actions of another. *See* Restatement (Second) of Torts § 448 (noting

that, absent certain circumstances, "[t]he act of a third person in committing an intentional tort or crime is a superseding cause of harm to another resulting therefrom"). But nobody is suggesting that Defendants should share in the criminal (or civil) liability that people who fail to respond to the census may incur. *Cf. Block*, 793 F.2d at 1309 ("That argument could be relevant to the merits of a tort action seeking to hold the government liable for damages as the *legal cause* of [the plaintiff's] injury; but it is irrelevant to the question of core, constitutional injury-in-fact, which requires no more than *de facto* causality."). The Article III standing inquiry is entirely different: It looks to the chain of causation connecting Defendants' conduct to Plaintiffs' injuries, and it asks whether Plaintiffs have shown that one is sufficiently traceable to the other so as to give Plaintiffs a sufficiently "personal stake" in the outcome of their challenge to create the adverseness required by Article III. Here, Plaintiffs have plainly made that showing.

Given the foregoing, it is not surprising that Defendants fail to cite any authority in support of their novel argument. Perhaps more surprising is the ample authority that contradicts their argument that they simply ignore. Thus, for instance, courts have found, in data breach cases, that customers have standing to bring claims against the companies that failed to safeguard their data—even though the hacker or "thief would be the most immediate cause of plaintiffs' injuries." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018); *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 390 (6th Cir. 2016) ("Although hackers are the direct cause of Plaintiffs' injuries, the hackers were able to access

Plaintiffs' data only because Nationwide allegedly failed to secure the sensitive personal information entrusted to its custody."); *Lambert v. Hartman*, 517 F.3d 433, 437-38 (6th Cir. 2008) (rejecting the argument that the intervening "criminal act of a third party" defeated standing where the plaintiff "link[ed] the act of identity theft" to the personal information divulged by the defendant). So too, in terrorist financing cases, courts have found standing—even though the most immediate cause of injury is the terrorist, not the bank or financier. *See, e.g.*, *Rothstein*, 708 F.3d at 93 ("[W]e cannot conclude that the Complaint failed to allege sufficiently that plaintiffs' injuries in bombings and rocket attacks conducted by Hizbollah and Hamas were fairly traceable to UBS's provision of U.S. currency to Iran."); *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 417 (E.D.N.Y. 2009) ("Here, while a number of independent third parties were involved in the attack on Bus 19, plaintiffs have alleged a coherent and plausible causal nexus linking UBS's alleged wire transfers for ASP to the bombing of Bus 19."); *accord Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 23 (D.D.C. 2010); *cf. Mendia*, 768 F.3d at 1013 (describing the plaintiff's theory of traceability, that "the government's unlawful conduct, while not directly causing his injury, nonetheless led third parties to act in a way that injured him," as "perfectly viable"). Most relevant for present purposes, Defendants' argument is incompatible with the many decisions, most notably the Second Circuit's decision in *Carey*, holding that "citizens who challenge a census undercount on the basis, inter alia, that improper enumeration will result in a loss of funds to their city have established . . . an injury fairly traceable to the Census Bureau." *Carey*, 637 F.2d at 838; *accord City of De-*

troit, 4 F.3d at 1375; *City of Philadelphia*, 503 F. Supp. at 671; *City of Camden*, 466 F. Supp. at 50.

Those basic standing principles are enough to turn away Defendants' arguments against traceability here. The touchstone of any Article III standing injury is whether the plaintiff has suffered, or is likely to suffer, an injury that is fairly traceable to the challenged conduct and redressable by the relief sought. Although congressional action can obviously affect whether particular injuries are "redressable" by creating (or not creating) causes of action, the "injury in fact" and "traceability" inquiries are fundamentally practical inquiries, grounded in the real-world consequences of human interaction—the sorts of things that give rise to "concrete and particularized" injuries that give plaintiffs a "personal stake" in federal litigation. In both cases, Article III demands something less than an ultimate merits inquiry might require: only that the defendant's conduct was a *de facto* cause of the plaintiff's injury, not that it was the "legal" or "proximate" cause. *Block*, 793 F.2d at 1309. Thus, while all three strikes are proximate causes of the strikeout, the last domino to fall is fairly traceable to the first. On Defendants' theory of traceability, Congress could abrogate standing to sue for that last domino falling by declaring it unlawful for the intervening dominoes to fall. But an injury's traceability for purposes of Article III—like Plaintiffs' injuries here—does not depend on whether the dominoes have congressional permission to fall; it depends only on whether, in fact, they *will*. Taking a practical look at the facts of these cases, the Court would have no trouble concluding that the apportionment losses, funding losses, and harms to data quality that Plaintiffs have proved were *proximately* caused by

Secretary Ross's decision. It is even easier to conclude, as the Court does, that Plaintiffs' injuries are fairly traceable to that decision.

That leaves only the element of redressability. Conspicuously, Defendants make no argument whatsoever concerning redressability—a tell, if there ever was one, that their arguments about traceability are themselves ultimately lacking. *See, e.g.*, *Watt*, 454 U.S. at 161 (stating that a plaintiff must "show that there is a 'fairly traceable' causal connection between the injury it claims and the conduct it challenges, *so that if the relief sought is granted, the injury will be redressed*" (emphasis added) (citation omitted)). In any event, given the Court's findings of fact and conclusions of law, it follows that Plaintiffs have proved that their injuries are "likely" to "be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). That is, if Secretary Ross's decision to add a citizenship question to the 2020 census is set aside or enjoined, as Plaintiffs request in these cases and as the Court concludes it must be, it is likely that its effects on the net differential undercount will be mitigated to the point of relieving Plaintiffs' injuries. Notably, to satisfy Article III's redressability requirement, a plaintiff must show that the requested relief will remedy "*an* injury" to the plaintiff, not "*every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982). And here, although the data generated by the 2020 census may still be less than perfect (no census is perfect, after all), and the resulting political apportionment and funding allocations may not be accurate to the seat or dollar, Plaintiffs have proved that their injuries specifically caused by the citizenship question will be mitigated, if not wholly remedied, by its removal.

RIPENESS

For the foregoing reasons, the Court concludes that most, if not all, Plaintiffs have standing to bring the claims pressed here—well more than the one Plaintiff with standing that the Court would need for jurisdiction. Before turning to the merits, however, there is one more threshold issue to address: ripeness. On December 28, 2018 (after trial ended), Defendants submitted the proposed census questionnaire, with the citizenship question, to OMB for approval under the Paperwork Reduction Act. *See* 83 Fed. Reg. 62713 (Dec. 28, 2018). As of today, OMB has not acted on the submission, and indeed it need not affirmatively approve the questionnaire for Secretary Ross's decision to be effective. Moreover, in the forty-two years since the enactment of the Paperwork Reduction Act, OMB has apparently never rejected a proposed census questionnaire. Nevertheless, Defendants assert that "because the citizenship question has not . . . received clearance . . . and may be rejected by OMB," Plaintiffs' claims are "unripe for judicial resolution." Defs.' Post-Trial Br. 72-73, ¶¶ 32-33.

Notably, Defendants did not raise the issue of ripeness until their post-trial briefs—and then raised it only in response to a query from the Court. *See* Tr. 1482-84; Defs.' Post-Trial Br. 72, ¶¶ 32-33; Docket No. 551 ("Defs.' Post-Trial Reply Br."), at 7. Furthermore, they now concede that "prudential ripeness," rather than jurisdictional ripeness, is "the appropriate framework" for analyzing these cases. Defs.' Post-Trial Reply Br. 1; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010) ("Ripeness reflects constitutional considerations that implicate Arti-

cle III limitations on judicial power, as well as prudential reasons for refusing to exercise jurisdiction." (internal quotation marks omitted)). That concession alone is fatal to their argument because a prudential ripeness argument, unlike a jurisdictional ripeness argument, can be waived, *see, e.g.*, *Stolt-Nielsen*, 559 U.S. at 670 n.2, and by failing to make the argument in their motion to dismiss, in a motion for summary judgment, or in their pretrial briefing, Defendants did just that.

In any event, Defendants' belated ripeness argument would fail on the merits. As the Supreme Court has explained, the ripeness doctrine "is designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967) (internal quotation marks omitted)). To evaluate a claim's ripeness for judicial review, therefore, a court must consider three factors: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." *Id.* at 733. In these cases, as Defendants all but concede, all three factors weigh heavily in favor of judicial review now.

First, there is no question that delayed review would cause hardship to Plaintiffs. As discussed above, the NGO Plaintiffs are *already* suffering harm from the addition of the citizenship question due to the diversion of valuable resources. And more broadly, as the Court explained in denying Defendants' attempts to stay trial, time is of the essence. *See New York v. U.S. Dep't of Commerce*, — F. Supp. 3d —, No. 18-CV-2921 (JMF), 2018 WL 5791968, at *6-*7 (S.D.N.Y. Nov. 5, 2018). According to Defendants themselves, the Census Bureau "need[s] to begin printing the 2020 census questionnaire" in June 2019. Docket No. 540, at 3. In light of that deadline, Defendants concede that even with this Court issuing a ruling now, "it is extremely unlikely that full merits briefing and argument in the Second Circuit, let alone the Supreme Court, would be possible." *Id.* It follows that dismissing the case as unripe pending OMB clearance later this year would almost certainly preclude Plaintiffs from obtaining a final ruling on their claims. *See Dep't of Commerce*, 525 U.S. at 332 (noting that a "pause" in litigation "would result in extreme—possibly irremediable—hardship" to plaintiffs challenging how the census was to be conducted). Indeed, when pressed at oral argument on whether it would make sense for the Court to dismiss the case as unripe given the time sensitivities and the limited opportunity for review after OMB clearance, defense counsel answered, with admirable candor, that "it probably does not." Tr. 1484. He further noted that "the hardship to the parties waiting for judicial review is a significant factor here." *Id.* at 1485. In sum, there is little or no dispute that the first ripeness factor weighs heavily in favor of prompt review.

Defendants do not even argue about the second and third factors, and for good reason. With respect to the second factor, judicial review at this stage would not inappropriately interfere with further administrative action. There is no dispute the Secretary Ross's decision constitutes "final agency action" reviewable under the APA. *Id.* at 1482. OMB could ultimately take the view that the decision to add a citizenship question fails even the most rudimentary cost-benefit analysis. But in that event, a judicial decision implying or concluding the same thing would hardly "interfere" with administrative action. To the contrary, both processes would act as complementary restraints on unlawful (the courts) or inefficient (OMB) governmental action. With respect to the third factor, Defendants can hardly maintain that the Court would benefit from further factual development of the issues presented. For one thing, Defendants have spent months arguing—and are still arguing, before the Supreme Court—that these cases should proceed to final judgment with *less* of a factual record. More importantly, the absence of Secretary Ross's deposition notwithstanding, the administrative and trial records in these cases are plainly sufficient to present the issues in a manner fit for judicial decisionmaking.

CTIA—The Wireless Ass'n v. FCC, 530 F.3d 984 (D.C. Cir. 2008), the principal case upon which Defendants rely, *see* Tr. 1482-83; *see also* Defs.' Post-Trial Reply Br. 7, is easily distinguished. As Plaintiffs point out, that case involved an FCC rule that was still awaiting OMB clearance and *required* such clearance in order to take effect. *CTIA*, 530 F.3d at 988. Accordingly, the question whether the FCC's action was "final" (and thus reviewable under the APA) was con-

tested and, in the D.C. Circuit's view, "entirely speculative." *Id.* at 987-88 (internal quotation marks omitted). Here, by contrast, Secretary Ross's decision was effective the day it was made—and, as noted, the finality of his decision is conceded. *See* Tr. 1482. The *CTIA* court also found "little hardship to the parties" in delaying decision, *CTIA*, 530 F.3d at 988, but, as noted above, that weighs in the opposite direction here. Finally, the court in *CTIA* noted that it was "not concerned" that the FCC would use a pause in proceedings "to delay unnecessarily judicial review of its rules going forward." *Id.* at 989. Alas, the Court does not have the same confidence here. Defendants submitted the questionnaire to OMB more than three months after they indicated they would, with no explanation. *See* AR 1170; Tr. 1484. And the submission was made months later than it was in either 2000 or 2010. *See* 73 Fed. Reg. 52264, 52264 (Sept. 9, 2008); 63 Fed. Reg. 43369, 43370 (Aug. 13, 1998). And, as the Court previously noted, much of Defendants' litigation strategy in these proceedings "makes so little sense, even on its own terms, that it is hard to understand as anything but an attempt to avoid a timely decision on the merits altogether." *New York*, 2018 WL 6060304, at *3. In short, *CTIA* undermines, rather than supports, Defendants' case.

Finally, although Defendants have now dropped their *jurisdictional* ripeness objection, the Court will address it anyway—if only because jurisdictional arguments cannot be waived and the Court has an independent obligation to confirm its own jurisdiction. *See United States v. Fell*, 360 F.3d 135, 139 (2d Cir. 2004). The jurisdictional, or "constitutional," ripeness inquiry "essentially mirrors that governing Article III standing, and

asks whether the question presents a 'genuine case or controversy.'" *United States v. Santana*, 761 F. Supp. 2d 131, 138 (S.D.N.Y. 2011); *see Sultum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 733 n.7 (1997) (distinguishing between cases that are unripe because they do not "properly present[] a genuine 'case or controversy' sufficient to satisfy Article III" and those that merely "fail[] to satisfy [the] prudential ripeness requirements"). For the reasons discussed above, these cases do present a genuine "case or controversy" within the meaning of Article III. In particular, Plaintiffs have proved that they face a substantial risk of injury or injuries that are "certainly impending." Accordingly, Plaintiffs' claims are jurisdictionally "ripe" for adjudication in federal court. That conclusion is further confirmed by the Supreme Court's conclusion that a similar pre-census challenge—filed roughly two years before the relevant census date, as these cases were—did not present a ripeness issue. *See Dep't of Commerce*, 525 U.S. at 329, 332.

ADMINISTRATIVE PROCEDURE ACT CLAIMS

With that, the Court can finally turn to the merits of Plaintiffs' claims, beginning with their claims that Defendants violated the APA in multiple ways. *See* SAC ¶¶ 183-197; NGO Compl. ¶¶ 208-212; *see also* Pls.' Proposed Conclusions ¶¶ 138-448.

A. General Legal Standards

The APA "sets forth the procedures by which federal agencies are accountable to the public and their actions subject to review by the courts." *Franklin*, 505 U.S. at 796. The APA thus provides that "[a] person suffering legal wrong because of agency action . . . is

entitled to judicial review thereof." 5 U.S.C. § 702. In a challenge to agency action brought pursuant to the APA, the statute provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. §§ 706(2)(A)-(D); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-14 (1971) ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977).

Through those provisions, the APA "establishes a scheme of 'reasoned decisionmaking.'" *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 52 (1983) ("*State Farm*")). "Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational." *Id.* Under the APA, therefore, courts must "hold unlawful and set aside" agency action that is "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A). "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered

an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Agency action can also fail arbitrary and capricious review if the agency fails to provide a "coherent explanation" of its decision, *Clark Cty. v. FAA*, 522 F.3d 437, 443 (D.C. Cir. 2008), or fails to justify departures from past practice (by, for example, failing to persuasively distinguish contrary precedent), *Mfrs. Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012) (Kavanaugh, J.). In short, arbitrary-and-capricious review implements the APA's requirement "that an agency's exercise of its statutory authority be reasonable *and* reasonably explained." *Id.* (emphasis added); *accord Laccetti v. SEC*, 885 F.3d 724, 725 (D.C. Cir. 2018) (Kavanaugh, J.).

Separate and apart from the mandate to set aside agency action that is arbitrary and capricious, the APA requires courts to set aside agency action that is "not in accordance with law," 5 U.S.C. § 706(2)(A), or is carried out without following procedures prescribed by statute, *see id.* § 706(2)(D). Indeed, the APA requires courts to set aside agency action if it violates the Constitution or some *other* law—even if that law is not directed at the agency or within the agency's specific bailiwick. *See FCC v. NextWave Personal Communications Inc.*, 537 U.S. 293, 300 (2003) ("The Administrative Procedure Act requires federal courts to set aside federal agency action that is "not in accordance with law," 5 U.S.C. § 706(2)(A)—which means, of course, *any* law, and not merely those laws that the agency itself is charged with administering."). Significantly, all of these provisions are "separate standards" operating as inde-

pendent constraints on agency action. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 284 (1974). Put another way, "[t]he 'scope of review' provisions of the APA are cumulative. Thus, an agency action" that survives review under one provision of Section 706 "may in another regard be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) (citation omitted).

Finally, and crucially, it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015); *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (describing the "simple but fundamental rule of administrative law," announced in *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) ("*Chenery I*"), "that a reviewing court . . . must judge the propriety of [agency] action solely by the grounds invoked by the agency"). Thus, "the *post hoc* rationalizations of the agency or the parties to . . . litigation cannot serve as a sufficient predicate for agency action." *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 539 (1981). "Congress has delegated to the administrative official and not to [his or her] counsel the responsibility for elaborating and enforcing statutory commands." *Investment Company Institute v. Camp*, 401 U.S. 617, 628 (1971). Accordingly, "an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *State Farm*, 463 U.S. at 50.

Of course, in subjecting Secretary Ross's decision to scrutiny under the APA, the Court "does not sit as a super-agency," and may not "substitute its . . . expertise" or evidence "presented to it de novo for the evidence received and considered by the agency." *Suffolk Cty. v. Sec'y of Interior*, 562 F.2d 1368, 1383 (2d Cir. 1977). Nevertheless, "courts retain a role, and an important one, in ensuring that agencies have engaged in reasoned decisionmaking." *Judulang v. Holder*, 565 U.S. 42, 53 (2011). By definition, Congress has assigned agency decisionmaking to the agency, to be carried out within constitutional and statutory bounds. But Congress has also provided for judicial review of agency decisions once they are final. And while it is the agency's job to make the decisions Congress has assigned to the agency, it is the courts' job to apply the APA. The APA "creates a basic presumption of judicial review for one suffering legal wrong because of agency action," *Weyerhaeuser Co. v. United States Fish & Wildlife Serv.*, 139 S. Ct. 361, 270 (2018) (alterations and internal quotation marks omitted), and, in the words of the Supreme Court, that review must be "thorough, probing, [and] in-depth," *Overton Park*, 401 U.S. at 415; *see id.* at 416 (mandating a "searching and careful" review). "In *all* cases agency action *must* be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements." *Id.* at 413-14 (emphases added).

B. The Scope of Review

Before turning to the substance of Plaintiffs' APA claims, the Court pauses to consider the question of what evidence it may consider in reviewing Plaintiffs' APA claims—an issue that has, at times, seemed central to these cases. As it turns out, the issue is not quite as central as it once seemed, both because the Court can resolve Plaintiffs' APA claims without relying on extra-record evidence and because Defendants ultimately stipulated that a wide swath of previously contested documentary material is properly part of the Administrative Record for purposes of this litigation. *See* Docket No. 523, at Joint Stip. ¶ 63.

It is well established that judicial review of administrative action is generally "based on the full administrative record that was before the Secretary at the time he made his decision." *Overton Park*, 401 U.S. at 420. Further, in evaluating agency action for compliance with the APA, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam). "Ordinarily," therefore, courts reviewing agency action for compliance with Section 706(2)(A) "confine their review to the 'administrative record.'" *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); *accord Yale-New Haven Hosp. v. Leavitt*, 470 F.3d 71, 81-82 (2d Cir. 2006); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981) ("[J]udicial review of agency action is normally confined to the full administrative record before the agency at the time the decision was made."). As the Court will explain, however, those words ("normally" and

"ordinarily") are key. And while in some ways, this is an ordinary APA case, in other ways, it is not.

In a case such as this one, the term "administrative record" is not particularly helpful in clarifying the proper object of judicial review. The Court's statutory obligation is to evaluate Secretary Ross's decision in light of the "whole record," 5 U.S.C. § 706, which must include all materials that were "before [him] . . . at the time he made his decision," *Overton Park*, 401 U.S. at 420. But this is not a case in which, because of the nature of the administrative proceedings below (such as agency adjudication or notice-and-comment rulemaking), either Secretary Ross or the Department of Commerce compiled an "administrative record" in the course of *making* his decision. Instead, as is often the case with "informal" agency actions, Secretary Ross amassed some information, consulted it, and made his decision on that basis. Then, only *after* these lawsuits were filed, the Department of Commerce conducted a search for materials that were "before" the Secretary at the time he made that decision, compiled those materials, and submitted them to the Court as the "Administrative Record." *See* Docket No. 173; *see also id.* Ex. 1 (certification of Sahra Park-Su, Senior Policy Advisor to the Secretary of Commerce, that Defendants' designated record is "a true copy of the complete administrative record upon which the Secretary of Commerce based his decision to reinstate a questior concerning citizenship on the 2020 Decennial Census," based on *her* "personal involvement with the . . . compilation and review of the documents comprising the administrative record"). Since that time, Defendants have added substantially to the "Administrative Record." *See* Docket Nos. 189, 212, 523, 524.

As a general matter, the compilation and submission of the "Administrative Record" by the agency that made the very decision under review is not unusual. Indeed, it appears to be the normal way of doing things where, as here, there is no preexisting administrative record available for judicial review. *See, e.g., Preserve Endangered Areas of Cobb's History, Inc. v. U.S. Army Corps of Engineers*, 87 F.3d 1242, 1247 n.2 (11th Cir. 1996) ("There is, of course, nothing wrong with an agency compiling and organizing the complete administrative record after litigation has begun from all the files of agency staff involved in the agency action, as long as that record only contains documents considered by the staff prior to the agency action."); *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court."). That said, the "whole administrative record," within the meaning of the APA, "is not necessarily those documents that the *agency* has compiled and submitted as 'the' administrative record." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Instead, the "whole administrative record" mandated by the APA "consists of all documents and materials directly or indirectly considered by agency decision-makers," including "evidence contrary to the agency's position." *Id.* (emphasis omitted); *Schicke v. Romney*, 474 F.2d 309, 315 (2d Cir. 1973) (noting, in reviewing agency action under the APA, that a court "must have before it the full administrative record which was before the agency and on which the agency determination was based"); *accord Overton Park*,

401 U.S. at 420; *Exxon Corp. v. Dep't of Energy*, 91 F.R.D. 26, 32 (N.D. Tex. 1981).

In such cases, courts have held that the agency's designation of an administrative record, "like any established administrative procedure, is entitled to a presumption of administrative regularity." *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993); *Comprehensive Cmty. Dev. Corp. v. Sebelius*, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012). Critically, however, that presumption is *only* a presumption. Put another way, "[a]n agency may not unilaterally determine what constitutes the Administrative Record." *Bar MK Ranches*, 994 F.2d at 739; *see Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977) (noting that an agency's unilateral decision to exclude material from the administrative record cannot "stand[] between [a court] and fulfillment of [its] obligation" under the APA). Ultimately, that question is one for the Court. *See, e.g.*, *Overton Park*, 401 U.S. at 420; *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 340 (D.C. Cir. 1989); *Dopico v. Goldschmidt*, 687 F.2d 644, 654 (2d Cir. 1982); *Suffolk Cty.*, 562 F.2d at 1384 n.9 (2d Cir. 1977). Moreover, the question of what constitutes the administrative (or "whole") record is a question of fact, subject to the usual incidents of district court factfinding and appellate review. *See, e.g.*, *Occidental Petroleum*, 873 F.2d at 340; *Dopico*, 687 F.2d at 654.

In light of the foregoing considerations, courts have recognized several limited exceptions to the "record rule"—that is, circumstances in which the "presumption of regularity" that ordinarily attaches to the administrative record compiled and submitted by the agency itself is rebutted and the reviewing court may consider

material beyond that record. *See generally* Richard McMillan, Jr. & Todd D. Peterson, *The Permissible Scope of Hearings, Discovery, and Additional Fact-finding during Judicial Review of Informal Agency Action*, 1982 Duke L.J. 333 (enumerating exceptions to the record rule). First, because "[t]he failure to include . . . information relied upon by the agency in the administrative record . . . is . . . inconsistent with the Administrative Procedure Act's requirement that review take place on 'the whole record,'" *U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 534 n.43 (D.C. Cir. 1978), where it appears that the administrative record designated by the agency is *not* the "whole record" that was before the agency decisionmakers at the time of decision, a court may order that the record be *completed*. *See Home Box Office*, 567 F.2d at 54 ("Even the possibility that there is here one administrative record for the public and [the] court and another for the [agency] and those 'in the know' is intolerable."). A court may do so where, as Plaintiffs did here, *see* July 3 Oral Arg. Tr. 79-82, a challenger shows that "materials exist that were actually considered by the agency decision-makers but are not in the record as filed," *Sebelius*, 890 F. Supp. 2d at 309, or has "made a prima facie showing that the agency excluded from the record evidence adverse to its position," *Kent Cty. Levy Court v. EPA*, 963 F.2d 391, 396 (D.C. Cir. 1992); *see also New York v. Shalala*, No. 93-CV-1330 (JFK), 1996 WL 87240, at *5 (S.D.N.Y. Feb. 29, 1996) ("The Court may also consider evidence that was considered by the agency but omitted from the formal administrative record."). Properly understood, however, an order directing *completion* of an administrative record is not the same thing as ordering "discovery" of

material *beyond* the record. Instead, it is an order that the agency provide the *real*—or "whole"—record for the court's consideration.[55]

Second, it is well established that a court may allow parties to *supplement* the record with additional material "to provide, for example, background information." *AT&T Info. Sys., Inc. v. Gen. Servs. Admin.*, 810 F.2d 1233, 1236 (D.C. Cir. 1987). Occasionally, such supplemental material will be "helpful in understanding the problem faced by the [a]gency and the methodology it used to resolve it," as in highly technical areas, and "[t]o a limited extent," it is "proper" for a court to consider such material as "a clarification or an explanation of the original information before the [a]gency." *Ass'n of Pac. Fisheries v. EPA*, 615 F.2d 794, 811 (9th Cir. 1980) (Kennedy, J.). Notably, it is not always (or, judging from the Court's review of the case law, even usually) the *plaintiffs* who seek to use such material in APA cases—the Government has been known to proffer "supplemental" extra-record material in defense of agency decisions as well. *See, e.g., Tripoli Rocketry*

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[55] A review of the case law reveals that courts are not always careful to distinguish in their terminology among "completing" the administrative record, "supplementing" the administrative record, and authorizing "extra-record" discovery. *See* Daniel J. Rohlf, *Avoiding the 'Bare Record': Safeguarding Meaningful Judicial Review of Federal Agency Action*, 35 Ohio N. L. Rev. 575, 615 (2009) ("[C]ase law on records issues is often somewhat muddled, at least apart from broad principles."). The concepts are distinct, however, and the Court will endeavor to treat them as such, although it does occasionally cite a case that—for example—refers to itself as a "supplementation" case when it is properly understood (at least in the terminology used here) as a "completion" case. *See, e.g., Kent Cty.*, 963 F.2d at 395-96.

Ass'n, Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives, 437 F.3d 75, 83-84 (D.C. Cir. 2006); *AT&T Info. Sys.*, 810 F.2d at 1236. But no matter who introduces it, this type of "supplemental" material *cannot* be used "as a new rationalization either for sustaining *or* attacking the [a]gency's decision." *Ass'n of Pac. Fisheries*, 615 F.2d at 811-12 (emphasis added); *see, e.g., Tripoli Rocketry*, 437 F.3d at 83-84 (noting that "new materials" produced in litigation to supplement the record may be considered as "merely explanatory of the original record and should contain no new rationalizations"); *accord Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1052 (2d Cir. 1985). Instead, a court may consider such materials only to illuminate a complex record and to help the court better understand the issues involved.

Third, and somewhat related, a court may consider such "supplemental" materials to evaluate whether an agency failed to consider all relevant factors, ignored an important aspect of the problem, or deviated from established agency practices. *See, e.g., AT&T Info. Sys.*, 810 F.2d at 1236. As noted above, a court must vacate and set aside an agency decision if it finds that the agency failed to consider all "relevant factors," *Overton Park*, 401 U.S. at 416, ignored "an important aspect of the problem," *State Farm*, 463 U.S. at 43-44, or made "an irrational departure from [settled] policy," *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996). It goes without saying that, to apply these standards, a court must have an adequate understanding of what is "relevant," "important," or "settled" in the field where the agency decision was made. And particularly where that field involves technical, complex, or specialized matters, as it does here, that may require looking be-

yond the bare administrative record. *See, e.g., Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not."). Indeed, without looking to evidence beyond the administrative record to determine the relevant factors, a court may be unable to identify, let alone redress, the most egregious APA violations: those in which the administrative record is carefully cultivated to exclude contrary evidence. *See also, e.g., Nat'l Audubon Soc. v. Hoffman*, 132 F.3d 7, 15 (2d Cir. 1997) (noting that "[t]he omission of technical scientific information is often not obvious from the record itself").

Finally, it is well established that courts reviewing the substantive validity of agency action may consider additional material beyond the administrative record —extra-record material going to the reasons for the agency's action—where there has been a "strong showing" that the agency has acted in "bad faith." *Id.* at 14 ("[A]n extra-record investigation by the reviewing court may be appropriate when there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decisionmakers. . . . " (citing *Overton Park*, 401 U.S. at 420)); *Nat'l Nutritional Foods Ass'n v. FDA*, 491 F.2d 1141, 1145 (2d Cir. 1974) (Friendly, J.) (holding that "testimony with regard to [an agency's] reasons," or "with regard to internal agency deliberations" "can be taken" only on a "strong showing of bad faith or improper behavior"); *accord Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996); *James Mad-*

ison Ltd., 82 F.3d at 1096; *Sierra Club v. Costle*, 657 F.2d 298, 389 n.450 (D.C. Cir. 1981). Although courts have set a high bar for such additional evidence going to an agency decisionmaker's reasons for acting, that bar is *not* impossible to clear—courts have treated the possibility as a real one from *Overton Park* to this day. *See, e.g.*, *Voyageurs Nat'l Park Ass'n v. Norton*, 381 F.3d 759, 766 (8th Cir. 2004); *Hoffman*, 132 F.3d at 14; *Nat'l Nutritional Foods Ass'n*, 491 F.2d at 1145 & n.5; *Tummino v. Hamburg*, 936 F. Supp. 2d 162, 185 (E.D.N.Y. 2013).

If a plaintiff's strong preliminary showing of bad faith or pretext later matures into a factual finding of bad faith or pretext, that "'fact' would be material to determining whether the [agency] acted arbitrarily" in violation of the APA. *James Madison Ltd.*, 82 F.3d at 1096; *see also, e.g.*, *Woods Petroleum Corp. v. U.S. Dep't of Interior*, 18 F.3d 854, 859-60 (10th Cir. 1994), *adhered to on reh'g*, 47 F.3d 1032 (10th Cir. 1995); *Parcel 49C Ltd. P'ship v. United States*, 31 F.3d 1147, 1150-51 (Fed. Cir. 1994). In *James Madison Ltd.*, the D.C. Circuit helpfully reframed this issue in terms of summary judgment procedure: Where a plaintiff asserts a genuine dispute as to an agency's bad faith, that dispute is only "material," and thus appropriate for trial, if the plaintiff's proffered evidence amounts to the "strong showing" necessary for including that evidence in the summary-judgment record in the first place. *Id.* at 1096-97. In other words, while a preliminary showing of "bad faith" can entitle a plaintiff to discovery on the question, a plaintiff must then prove "actual" bad faith in order to prevail on an APA claim. Similarly, if a plaintiff is able to prove that the agency's stated reasons for acting were not its "real" reasons,

then the plaintiff has proved that the agency's decision was not "reasonably explained" as the APA requires it to be. On that score, Defendants have wisely conceded that if Plaintiffs establish that Secretary Ross's "stated rationale [was] pretextual, that would be a basis for" relief under the APA. Docket No. 150 ("May 9 Conf. Tr."), at 15; *see also* Docket No. 366 ("Sept. 14 Conf. Tr."), at 36-37 (defense counsel maintaining that if the Court "were to conclude . . . that the state[d] reason were not the real reason that that would be a factor for review under the arbitrary and capricious standard[,] that the decision would not be rational for the stated reason").

C. Discussion

With those principles in mind, the Court turns to the merits of Plaintiffs' APA claims. For reasons the Court will explain at length, the APA compels the Court to "hold unlawful and set aside," 5 U.S.C. § 706(2), Secretary Ross's decision to add a citizenship question to the 2020 census for four independent reasons. First, the Court concludes that Secretary Ross ignored and violated a clear statutory duty to rely on administrative records (rather than direct inquiries) to the "maximum extent possible," 13 U.S.C. § 6(c), rendering his decision "not in accordance with law," 5 U.S.C. § 706(2)(A). Second, even if that statute did not exist, Secretary Ross's decision to add a citizenship question rather than collect citizenship data through more effective and less costly means was "not supported by the reasons [he] adduce[d]," *Allentown Mack Sales & Service*, 522 U.S. at 374, making it "arbitrary and capricious" in violation of Section 706(A). Third, although a closer question, the Court finds that Secretary Ross failed to

satisfy the statutory requirement that he report any plan to address the subject of citizenship to Congress at least three years before the decennial census, in violation of Title 13, United States Code, Section 141(f)(1). And fourth, the Court concludes that Secretary Ross's decision was pretextual—that the rationale he provided for his decision was not his real rationale.

In reaching these conclusions, the Court is mindful of the dispute between the parties, finally ripe for resolution, about whether and to what extent the Court may consider evidence beyond the Administrative Record. Consistent with the standards discussed above, the answer differs depending on the nature of Plaintiffs' specific claims. Specifically, the Court may not—and does not—consider or rely on material outside the Administrative Record in evaluating whether Secretary Ross's decision was "arbitrary and capricious," except to the limited extent that Secretary Ross is alleged to have "entirely failed to consider an important aspect of the problem," *State Farm*, 463 U.S. at 43, or that such material would further illuminate the issues before the Court (albeit, in that case, *without* substituting any such material proffered by Defendants for the reasons given by Secretary Ross), *Ass'n of Pac. Fisheries*, 615 F.2d at 811-12; *cf. Michigan*, 135 S. Ct. at 2710. That is, in examining the question whether Secretary Ross's decision rested on a "rational connection between the facts found and the choice made," *State Farm*, 463 U.S. at 43 (internal quotation marks omitted), "the focal point" of the Court's review is "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp*, 411 U.S. at 142. Similarly, the Court may not —and does not—consider any extra-record evidence

(and materials of which the Court may take judicial notice) in evaluating Plaintiffs' arguments that Secretary Ross's decision was "not in accordance with law" or "without observance of procedure required by law," 5 U.S.C. § 706(2)(A), (D), because he failed to comply with Sections 6(c) and 141(f). By contrast, the Court *may* consider material outside the administrative record in evaluating whether Secretary Ross's decision was made in bad faith or was pretextual. Ultimately, however, the issue does not matter for purposes of Plaintiffs' APA claims because the Court would reach the same conclusions with respect to those claims whether it is limited to the Administrative Record or not.

1. Secretary Ross's Decision Was Not in Accordance with Law

First and foremost, Secretary Ross's decision was unlawful because it was "not in accordance with law." 5 U.S.C. § 706(2)(A). As discussed above, Congress has delegated to the Secretary broad discretion over the conduct of the census. Critically, however, that discretion is not unlimited and, in opting to add the citizenship question to the 2020 census questionnaire in the manner that he did, Secretary Ross violated two of those limits. First, and most blatantly, he violated the mandate in Section 6(c) of the Census Act to "acquire and use information" derived from administrative records "instead of conducting direct inquiries" to the "maximum extent possible." And second, he did not include citizenship as a subject to be included on the 2020 census questionnaire in a report to Congress, as

required by Section 141(f) of the Census Act.[56] The Court plainly has authority to set aside Secretary Ross's decision on the basis of the former violation—indeed, to do otherwise would be to sanction a blatant disregard of a critical substantive limitation on the Secretary's delegated powers. Whether the Court has the same authority with respect to Secretary Ross's violation of Section 141(f) is a closer question, but in the circumstances presented here, the Court concludes that it does. The Court will address each defect in turn, limiting its discussion to evidence contained in the Administrative Record.

a. The Section 6 Violation

The Court begins with Section 6(c), a statutory provision that Congress enacted seemingly—indeed, almost prophetically—for the very circumstances presented here.[57] Section 6 of the Census Act provides in full as follows:

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[56] *Amicus* Electronic Privacy Information Center contends that Defendants also violated the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, because they failed to conduct an adequate "privacy impact assessment" before proposing to collect citizenship data through the census. *See* Docket No. 428-1, at 11. The Court declines to address that contention, however, as Plaintiffs did not press it. *See, e.g., Citizens Against Casino Gambling in Erie Cty. v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007) ("Amicus participation goes beyond its proper role if the submission is used to present wholly new issues not raised by the parties."); *Russell v. Bd. of Plumbing Examiners*, 74 F. Supp. 2d 349, 351 (S.D.N.Y. 1999) ("The *amicus* cannot raise or implicate new issues that have not been presented by the parties.").

[57] Defendants initially contended in their post-trial brief that Plaintiffs had forfeited any argument based on Section 6(c), *see* Defs.' Post-Trial Br. 77, ¶ 55, but they expressly abandoned any

> (a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.
>
> (b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.
>
> (c) To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to in subsection (a) or (b) of this section instead of conducting direct inquiries.

13 U.S.C. § 6. The origins of Section 6 can be traced back to 1929, when Congress first authorized the Secretary to collect administrative records from federal sources. *See* Act of June 18, 1929, Pub. L. No. 71-13, 46 Stat. 21, 25. In 1957, Congress expanded the Secretary's authority to include collection of state and local administrative records, and divided Section 6 into two subsections: today's Section 6(a), which authorizes the acquisition of federal records, and Section 6(b), which

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such contention at oral argument, *see* Tr. 1528-29. In any event, the Court would conclude that Plaintiffs adequately raised the issue through their pleadings and witness examinations, substantially for the reasons they argued orally. *See* Tr. 1517-20.

authorizes the acquisition of state and local records. *See* Act of Aug. 28, 1957 ("1957 Census Act") § 3, Pub. L. No. 85-207, 71 Stat 481, 481 (codified at 13 U.S.C. § 6(b) (Supp. V 1958)).

As noted above, Congress enacted several significant new limits on the Secretary's authority with respect to the census in 1976. *See* 1976 Census Act, Pub. L. No. 94-521, 90 Stat. 2459. As the United States House of Representatives explained in a Supreme Court brief filed twenty years ago, the 1976 Census Act "constrained the Secretary's authority" in order to "address[] concerns that the [Census] Bureau was requiring the citizenry to answer too many questions in the decennial census." Brief for Respondents at 37 n.50, 40, *U.S. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (No. 98-404), 1998 WL 767637. To that end, Congress enacted the current Section 195, which *requires* sampling (where "feasible") for all purposes other than apportionment in the House of Representatives, rather than merely *authorizing* it. *See* 13 U.S.C. § 195. And Congress enacted the current Section 6(c), which generally mandates the use of administrative records "to the maximum extent possible," in lieu "of conducting direct inquiries." *Id.* § 6(c); *see* H.R. Rep. No. 94-1719, at 10 (1976) (Conf. Rep.), *as reprinted in* 1976 U.S.C.C.A.N. 5476, 5477-78 (describing the "new subsection (c), the provisions of which direct the Secretary of Commerce to acquire and use to the greatest extent possible statistical data available from other sources in lieu of making direct inquiries. While existing law authorizes the Secretary to purchase or otherwise acquire such information, the amendment made by the House bill is intended to emphasize the Congress' desire that such authority be used whenever

possible in the dual interests of economizing and reducing respondent burden."); S. Rep. No. 94-1256, at 3 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5463, 5465-66 (similar); *see also* Brief for Petitioners at 12 n.9, *Baldrige v. Shapiro*, 455 U.S. 345 (1982) (No. 80-1436), 1981 WL 389922 (brief filed by the Acting Solicitor General on behalf of the Secretary of Commerce and Acting Director of the Census Bureau, noting the requirements of 6(c) and its legislative history).

For present purposes, several features of Section 6(c) loom large. First, by its terms, the statute is mandatory where it applies: The Secretary "*shall* acquire and use" data gleaned from administrative records. 13 U.S.C. § 6(c) (emphasis added). Second, it imposes an affirmative duty not only to use such data, but also to *acquire* more of it when appropriate to fulfil the Secretary's other statutory responsibilities. Third, the statute explicitly requires the acquisition and use of such administrative-record data *instead* of asking questions through "direct inquiries" on the decennial census or other surveys—a clear, direct command that the Secretary *not* add additional questions to the census or other survey questionnaires where administrative records would suffice. Fourth, Section 6(c) requires the acquisition and use of administrative records instead of collecting data through direct inquiries "[t]o the maximum extent possible"—confining the Secretary's duty to the bounds of the possible, but requiring him to exhaust that limit. And finally, the statute requires the "maximum . . . possible" use of administrative records "consistent with the kind, timeliness, quality and scope of the statistics required," authorizing departures from Section 6(c)'s obligation only where certain characteristics of "required" statistics justify them.

To the extent relevant here, the upshot is that, if the collection of data through the acquisition and use of administrative records would be as good or better than collection of data through the census, Section 6(c) leaves the Secretary no room to choose; he may not collect the data through a question on the census.

Considering these features here, the Court easily concludes that Secretary Ross's decision ran afoul of Section 6(c). For one thing, Secretary Ross nowhere mentions, considers, or analyzes his statutory obligation to "acquire and use" administrative records "[t]o the maximum extent possible . . . instead of conducting direct inquiries." Agency action taken in ignorance of applicable law is arbitrary and capricious, and must be vacated. *See, e.g., Caring Hearts Pers. Home Servs., Inc. v. Burwell*, 824 F.3d 968, 970-71 (10th Cir. 2016) (Gorsuch, J.); *Friends of Richards-Gebaur Airport v. FAA*, 251 F.3d 1178, 1195 (8th Cir. 2001) ("[A]n agency implementing a statute may not ignore . . . a standard articulated in the statute."); *cf. Porzecanski v. Azar*, 316 F. Supp. 3d 11, 19-20 (D.D.C. 2018) (holding that agency action that "relies on the wrong law" must be vacated). In his decision memorandum, Secretary Ross treated the choice between Alternatives C and D as a matter of policy committed to his discretion. In other words, he acted "as though the choice between them were a matter of complete indifference from the statutory point of view." *Ohio v. U.S. Dep't of the Interior*, 880 F.2d 432, 444 (D.C. Cir. 1989). But it was not. Congress had already made the policy decision to *require* the acquisition and use of administrative records "[t]o the maximum extent possible" *in lieu of* conducting "direct inquiries." 13 U.S.C. § 6(c). The congressional preference set forth in Section 6(c) "pre-

cludes" a decision "which totally ignores that preference." *Ohio*, 880 F.2d at 444; *see NRDC v. U.S. EPA*, 658 F.3d 200, 217 (2d Cir. 2011) (determining that "[t]he lack of . . . an explanation" as to how an agency action complies with applicable statutory standards "is arbitrary and capricious").

Given Secretary Ross's failure even to acknowledge Section 6(c), it is perhaps no surprise that he failed to articulate a rationale that would meet the statute's requirements for justifying the use of a direct inquiry about citizenship status. Granted, he expressed a preference for data compiled entirely of survey self-responses and hypothesized that giving every person an opportunity to self-respond "may eliminate the need" for any imputation. AR 1317. And he expressed a "judgment that [Alternative] D will provide DOJ with the most complete and accurate CVAP data in response to its request." *Id.* But Secretary Ross nowhere explained whether or how adding a citizenship question to the census questionnaire was consistent with the mandate to avoid "direct inquiries" to the "maximum extent possible"; or, to the extent that he suggested (albeit without explicit reference to the statute) that his decision was "consistent with the kind, timeliness, quality and scope of the statistics required," whether or how the "statistics" at issue are *required*—as opposed to merely desired. On the latter score, Secretary Ross is not excused from compliance with Section 6(c)'s dictates merely because another federal department asks him to add a "direct inquir[y]" to the census, as DOJ did here (at least formally). By its plain terms, Section 6(c) constrains the authority of "*the Secretary*." 13 U.S.C. § 6(c) (emphasis added); *cf. Delaware Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 16

(D.C. Cir. 2015) ("EPA seeks to excuse its inadequate responses by passing the entire issue onto a different agency. Administrative law does not permit such a dodge."). And if that were not clear enough, Congress explicitly provided that the Secretary of Commerce's authority to share "tabulations and other statistical materials" with other federal departments, such as DOJ, is "[s]ubject to the limitations contained in section[] 6(c)." 13 U.S.C. § 8(b).

In short, Secretary Ross violated Section 6(c) by adding a "direct inquiry" to the census questionnaire when the data gained from available administrative records would have been adequate—indeed, better. Notably, Defendants do not really even try to argue that Secretary Ross complied with the letter of Section 6(c)—a tacit admission that his decision was "not in accordance with law." 5 U.S.C. § 706(2)(A). Instead, they are left to argue that he complied with the statute in spirit—that, without saying so, he effectively made a finding that "the information that could be gained from administrative records alone was not of 'the kind, timeliness, quality and scope of the statistics required' for the Department of Justice's Voting Rights Act enforcement efforts." Defs.' Post-Trial Br. 77, ¶ 58. Defendants are certainly correct that, even as he acknowledged evidence that administrative records are more accurate than self-responses "in the case of non-citizens," Secretary Ross *tried* to justify his decision not to rely on administrative records in lieu of a direct inquiry. AR 1316. "[T]he Census Bureau," he claimed, "is still evolving its use of administrative records, and the Bureau does not yet have a complete administrative records data set for the entire population." *Id.* According to Secretary Ross, that meant that "using administra-

tive records alone to provide DOJ with CVAP data would provide an incomplete picture"—namely, that roughly ten percent of the American population "would need to have their citizenship [status] imputed by the Census Bureau." *Id.* "Given the scale of [that] number, it was imperative that another option be developed to provide a greater level of accuracy than either self-response alone or use of administrative records alone would presently provide." *Id.* The problem is that, even on its own terms, that explanation does not come close to meeting Section 6(c)'s requirements for collecting citizenship data through a direct inquiry, let alone a direct inquiry on the census, rather than through administrative records.[58]

For one thing, Secretary Ross appears to have misunderstood his own options. Alternative B (merely adding a citizenship question to the census) would not have relied on "self-response *alone*" to capture citizenship data—far from it, given that the addition of a citizenship question would cause a *decline* in self-response and lead to more households having citizenship data collected through in-person enumeration, administrative records, proxy response, *and* imputation. *See* AR 1280-82. And Alternative C would not have relied on "administrative records alone," given the necessity of imputing citizenship status to some number of households. AR 1305, 1311. Instead, *both* alternatives

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[58] Secretary Ross's preference for a "hard count" of citizenship status is also hard to square with Congress's explicit mandate that, for all purposes *other* than congressional apportionment (that is, the "actual Enumeration" mandated by the Constitution), the Secretary gather data using sampling "if he considers it feasible." 13 U.S.C. § 195.

would have involved some degree of imputation—i.e., "modeling"—of responses. *Id.* The difference, as the record overwhelmingly demonstrates, is that Alternative B—and, by extension, Alternative D, which Secretary Ross adopted—would have introduced errors into citizenship self-responses, corrupting both that data and the data generated by extrapolating from self-responses through imputation. AR 1278, 1280-82, 1305. In other words, and as explained in more detail below in assessing the substantive reasonableness of Secretary Ross's decision, every relevant piece of evidence in the Administrative Record supports the conclusion that Alternative D would produce *less accurate citizenship data* than Alternative C—and *none* supports the conclusion that Alternative D would yield more accurate citizenship data given Secretary Ross's own criteria or the parameters discussed in the Gary Letter. Given that, it cannot be said, even in spirit, that "the kind, timeliness, quality and scope of the statistics" allegedly "required" for DOJ's VRA enforcement efforts justified the use of a census question under Section 6(c).

Defendants' only other attempt to justify Secretary Ross's failure to heed Section 6(c) is to argue that "there is no apparent distinction between the citizenship question and a number of other questions on the decennial census for purposes of 13 U.S.C. § 6(c)," such as the questions about sex, race, and ethnicity. Defs.' Post-Trial Br. 77, ¶ 57. And because "no one would suggest that the statute prohibits the Census Bureau from including *those* questions," they continue, it cannot be read to prohibit the citizenship one either. *Id.* (emphasis added). But that argument falls short for three independent reasons. First, as noted, it is a "foundational principle of administrative law that a court may uphold agency

action *only* on the grounds that the agency invoked when it took the action," *Michigan*, 135 S. Ct. at 2710 (emphasis added), and, as discussed above, Secretary Ross's March 26, 2018 Memorandum contained no analysis whatsoever of his statutory obligations under Section 6(c)—let alone this specific argument, which Defendants present for the first time through their counsel in this litigation. Second, collection of data about sex, race, and ethnicity through direct inquiries rather than administrative data may or may not be justified under the standards set forth in Section 6(c) —the Administrative Record in these cases obviously does not speak to that question and the parties have not briefed it. And third, even assuming *arguendo* that collection of such data *cannot* be reconciled with the statute's text, Defendants cite no authority for the proposition that *those* violations of Section 6(c) would justify *this* one. Two statutory wrongs do not make a right.[59]

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[59] Along similar lines, given that a citizenship question appeared on the long-form questionnaire in the 1980, 1990, and 2000 censuses, and has appeared on the ACS since 2005, one could conceivably argue that Congress has acquiesced in the practice and that asking the question on the 2020 census would thus not run afoul of Section 6(c). Defendants do not make that argument, however, and have thus waived it. Moreover, it may be that direct inquiries on those instruments *were* justified under Section 6(c)—for example, because the Census Bureau's ability to collect the relevant data through the use of administrative records was not as advanced as it is now or because the "statistics required" were somehow different. (Among other things, the Census Bureau is statutorily *required* to collect CVAP data *on the ACS* in connection with Section 203 of the Voting Rights Act. *See* 52 U.S.C. § 10503(b)(2)(A).) Once again, neither the record nor the parties speak to those questions here. The only question presented here is whether, given the Adminis-

"[T]he Constitution vests *Congress*," not the Executive, "with wide discretion over . . . the conduct of the census," *Wisconsin*, 517 U.S. at 15 (emphasis added), and it is only because of Congress's statutory delegations that the Secretary of Commerce has any authority to design and conduct the decennial census at all. It goes without saying that that authority extends only as far as Congress has provided, ends where Congress says it ends, and can only be exercised subject to the conditions and constraints that Congress has imposed. Here, Congress has spoken clearly: To the maximum extent possible and given the kind, timeliness, quality and scope of the data required, Secretary Ross *must* gather data through the acquisition and use of administrative records, not by adding direct inquiries to the census or other surveys. Because Secretary Ross ignored that requirement altogether—and, in the process, blatantly violated it as well—his decision was "not in accordance with law." 5 U.S.C. § 706(2)(A).

b. The Section 141(f) Violation

The 1976 Census Act added one more constraint on the Secretary's authority to conduct the census that is relevant here: a deadline to report the subjects and questions planned for the census to Congress. *See* 1976 Census Act § 7(a), 90 Stat. 2462; 13 U.S.C. § 141(f). Section 141(f) provides in relevant part:

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trative Record in *this* case, Secretary Ross's decision to collect citizenship data through the *2020* census questionnaire rather than through administrative records was consistent with Section 6(c). For the reasons stated above, it was not.

> With respect to each decennial . . . census conducted under subsection (a) . . . of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census—
>
> (1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;
>
> (2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and
>
> (3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

13 U.S.C. § 141(f). The statute is plainly intended to facilitate Congress's oversight of the Secretary, thereby enabling the legislature to fulfil its "constitutional duty . . . to ensure that the decennial enumeration of the population is conducted in a manner consistent with the Constitution and laws of the United States." 1998 Appropriations Act, § 209(a)(1), 111 Stat. at 2480-81.

Secretary Ross submitted Section 141(f)(1) and (2) reports to the relevant congressional committees in March 2017 and March 2018, respectively. AR 149; PX-489, at 1.[60] The problem is that the Section 141(f)(1) report, titled "Subjects Planned for the 2020 Census and American Community Survey," included only five planned "subjects" for the 2020 census: Age, Gender, Race/Ethnicity, Relationship, and Tenure (Owner/Renter). AR 204-13. It did not include "citizenship."[61] By contrast, Secretary Ross did include the proposed citizenship question in the Section 141(f)(2) report, titled "Questions Planned for the 2020 Census and American Community Survey," which was filed within days of his March 26, 2018 Memorandum. PX-489, at 7. The report stated that "[a] question about a person's citizenship is used to create statistics about citizen and noncitizen populations" and that "[t]hese statistics are essential for enforcing the Voting Rights Act and its protections against voting discrimination." *Id.* (capitalization altered). Notably, it claimed that a question about citizenship had been asked in 1820, 1830, 1870, and from "1890 to present." *Id.* That claim, of course, is flat wrong in one respect (citizenship did not appear on the 2010 census at all) and materially misleading in another (the citizenship question was not asked of every household in 1960 or thereafter).

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[60] As noted above, the Court can—and does—take judicial notice of the March 2018 Section 141(f)(2) report even though it is not contained in the Administrative Record.

[61] The Section 141(f)(3) report did include "Place of Birth, Citizenship, and Year of Entry" as one of the planned subjects for the ACS. *See* AR 248.

Defendants try to excuse Secretary Ross's conceded failure to include citizenship as a subject of the census in the Section 141(f)(1) report by contending that the Section 141(f)(2) report satisfied the requirements of Section 141(f)(3), which allows the Secretary to add subjects or questions to the census "after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date." *See* Defs.' Post-Trial Br. 80, ¶ 65.[62] But that argument is unpersuasive for two reasons. First, by its terms, Section 141(f)(3) conditions the belated addition of a new subject or question on a "find[ing]" by the Secretary that "new circumstances exist which necessitate that the subjects, types of information, or questions contained in reports so submitted be modified." 13 U.S.C. § 141(f)(3). And, putting aside the question of whether any such findings would be subject to judicial review, there is no evidence —in the Section 141(f)(2) report, in Secretary Ross's

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[62] Notably, Defendants did not make any argument with respect to Section 141(f) in their pretrial briefing, even though Plaintiffs explicitly contended in their initial pretrial brief that Secretary Ross had violated the statute and that the violation provided an independent basis for relief under the APA. *Compare* Docket Nos. 413 and 456, *with* Docket No. 410, at 28-29, *and* Docket No. 455, at 7-8. On that basis, the Court could conceivably find that Defendants waived any merits-based arguments in opposition to Plaintiffs' contention. *See, e.g., League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814, 829 (9th Cir. 2018) ("The EPA presents no arguments in defense of its decision. Accordingly, the EPA has forfeited any merits-based argument."). The Court declines to find such waiver, however, in part given the significance of the matter, in part because Defendants' arguments are to some extent jurisdictional, and in part because Defendants did at least cite Section 141(f) in their pretrial reply (albeit without any discussion whatsoever of the issues). *See* Defs.' Pretrial Reply Br. 6.

March 26, 2018 Memorandum, or anywhere else in the Administrative Record for that matter—that Secretary Ross ever made such a finding. Second, again by its own terms, Section 141(f)(3) requires the Secretary to submit a separate report to the relevant congressional committees if he finds, after having submitted the "subject" report, that new circumstances necessitate modifying the subjects to be asked on the census. But if the Section 141(f)(2) report could satisfy Section 141(f)(3) when the Section 141(f)(1) report was to be modified, then there would have been no reason for Congress to mention Section 141(f)(1) in Section 141(f)(3). The Secretary could always modify the "subject" report required by Section 141(f)(1) by simply submitting a "question" report with a new question, rendering Section 141(f)(3)'s reference to "paragraph (1) . . . of this subsection" superfluous. Construing the statute in that manner would violate the canon that courts must give effect to all of a statute's provisions "so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citations omitted).

Defendants are on slightly firmer ground in arguing that Secretary Ross's violation of Section 141(f) is a matter for Congress, not the courts, to address. *See* Defs.' Post-Trial Br. 78-79, ¶¶ 61-64. That argument finds some support in a line of out-of-Circuit cases, *see id.* at 79 (citing cases), the leading examples of which are *Guerrero v. Clinton*, 157 F.3d 1190 (9th Cir. 1998), and *NRDC v. Hodel*, 865 F.2d 288 (D.C. Cir. 1988). In *Guerrero*, the plaintiffs—two federal territories and the State of Hawaii—challenged the adequacy of a report submitted by the Director of the Office of Insular Affairs to Congress pursuant to a statute mandating an

annual report. *See* 157 F.3d at 1191. On appeal, the Ninth Circuit held "that the adequacy of the report" was not reviewable for two interrelated reasons. *Id.* First, because the required report was "purely informational" and no "legal consequences" flowed from it, the plaintiffs' injuries could not be redressed by "the relief requested (a better report)." *Id.* at 1194-95. Second, relying on *Hodel*, the Court concluded that the report was not final agency action subject to APA review —or, more precisely, "not agency action of the sort that is typically subject to judicial review." *Id.* at 1195. "Because it triggers no legal consequences and determines no rights or obligations," the Court reasoned, "no check on the substance of the report is necessary. Having requested the report, Congress, not the judiciary, is in the best position to decide whether it's gotten what it wants." *Id.* In sum, "the adequacy of the . . . reports is not reviewable, and the injury asserted by the governments is correspondingly not redressable, because the . . . report that Congress asked for is primarily a tool for its own use, without cognizable legal consequences." *Id.* at 1197.

The statute at issue in *Hodel*, Section 111 of Public Law No. 99-591, directed the Secretary of the Interior to "indicate in detail . . . to the President and Congress" his reasons for rejecting lease proposals under an Outer Continental Shelf oil and gas leasing program. 865 F.2d at 316 (quoting Pub. L. No. 99-591 § 111(b), 100 Stat. 3341, 3341-261 (1986)). The petitioners sued under Section 111, contending that "adequate explanations were not provided for the Secretary's rejection of portions of three particular proposals." *Id.* at 316. Like the *Guerrero* Court, the D.C. Circuit held that that claim was "not susceptible of judicial review" for

two "closely related" reasons. *Id.* at 317, 319. First, the Court concluded that "the nature of the 'agency action' at issue" was "quite distinct from the prototypical exercise of agency power" subject to the presumption in favor of judicial review. *Id.* at 318. As the Court explained:

> Executive responses to congressional reporting requirements of the kind presented here represent, we believe, an entirely different sort of agency action. Under the reporting requirement before us, the designated Executive Branch officer is simply reporting back to the source of its delegated power in accordance with the Article I branch's instructions. Lacking a provision for judicial review, the measure before us embodies a requirement that by its nature seems singularly committed to *congressional* discretion in measuring the fidelity of the Executive Branch actor to legislatively mandated requirements.

Id. Significantly, however, the Court noted in an accompanying footnote that it was "decid[ing] only the issue" presented and that it therefore had "no occasion to pass on the broad, theoretical question whether an interbranch reporting requirement can ever be reviewable in the absence of an express provision for judicial review." *Id.* at 318 n.33. It then stressed that the petitioners' "contention" was "not that the Secretary failed entirely to report back to Congress (and the Governor), but that the Secretarial response lacked the requisite 'detail.'" *Id.* at 318. "If the Secretary's response has indeed been deemed inadequate (in the statutory sense of 'insufficiently detailed') by its recipient," the Court concluded, "then it is most logically for the recipient of the report to make that judgment and

take what it deems to be the appropriate action." *Id.* at 318-19.

The *Hodel* Court then cited a "second, and closely related, reservation about embracing the customary presumption of reviewability in this unusual setting." *Id.* at 319. "Under the specific circumstances of this reporting provision," the Court concluded, "we despair at formulating judicially manageable standards by which to gauge the fidelity of the Secretary's response to the strictures of section 111." *Id.* The Court reasoned that an inquiry into "[w]hether a report to Congress is sufficiently 'detailed' within the meaning of section 111" was "inherently elusive, especially in light of the statute's apparent purpose to inform and further the ongoing interbranch negotiation process." *Id.* "Generally," the Court concluded, "congressional reporting requirements are, and heretofore have been, a management tool employed by Congress for its own purposes. We decline to take the remarkable step, rife with the danger of flooding an already over-burdened judicial system with failure-to-report cases, of reviewing petitioners' section 111 claim when Congress has not provided for judicial scrutiny of this aspect of the interbranch relationship." *Id.*

Although they are non-binding, *Guerrero* and *Hodel* give the Court some pause about entertaining Plaintiffs' Section 141(f) arguments, if only because there is broad language in the two opinions suggesting that congressional reporting requirements are entirely a matter for Congress, not the courts. But as the Ninth and D.C. Circuits themselves noted, the *holdings* of the two cases do not extend so far. *See Hodel*, 865 F.3d at 318 n.33 ("We obviously decide only the issue before us;

we have no occasion to pass on the broad, theoretical question whether an interbranch reporting requirement can ever be reviewable in the absence of an express provision for judicial review."); *accord Guerrero*, 157 F.3d at 1195 n.10. And there are two critical distinctions between the situations in those cases (and in the other cases cited by Defendants, which follow *Guerrero* and *Hodel*) and the situation here. First, the reports in those cases were not conditions precedent to some other agency action subject to judicial review. In *Guerrero*, the statute at issue required the President (through his designee, the Director of the Office of Insular Affairs) to do no more than submit an annual report to Congress. *See* 157 F.3d at 1191-92 & n.4. It did not require anything further from the Executive Branch, absent separate congressional action. And in *Hodel*, the statute required the Secretary of Interior to submit the report at issue to the President and Congress at the same time that he submitted a proposed final Outer Continental Shelf leasing program. *See* 865 F.2d at 316 n.27. The statute required him to explain in the report "why" he had not "accepted" certain proposals for the leasing program, but it did not otherwise require him to take further action. Thus, in both *Guerrero* and *Hodel*, the reports were freestanding and "purely informational." 157 F.3d at 1194. The question presented was whether the reports themselves could be challenged, separate and apart from any other agency action.

The reporting requirement here is very different. Section 141(f) requires the Secretary to file reports before he may take other action delegated to him by statute—namely, to the extent relevant here, before he may add a new subject or question to the census ques-

tionnaire. In other words, "legal consequences" do "flow" from the Section 141(f) reports. *Id.* at 1195. Once he files the "subjects" report mandated by Section 141(f)(1), he is statutorily required to adhere to those subjects on the census questionnaire unless he finds "new circumstances . . . which necessitate that the subjects" be modified and reports these modified subjects to Congress. 13 U.S.C. § 141(f)(3). And it is the Secretary's ultimate decision—not, as in *Guerrero* and *Hodel*, the mere failure to submit an adequate report in itself—that Plaintiffs challenge. That makes all the difference in the world. Defendants concede that Secretary Ross's decision to add the citizenship question qualifies as "final agency action" for purposes of the APA. *See* Tr. 1482. Thus, it is, in *Hodel*'s words, a "prototypical exercise of agency power" subject to "the general presumption of reviewability of agency action" and the "congressional directive for judicial review of claims by non-congressional parties" embodied in the APA. *Hodel*, 865 F.2d at 318-19. That is, through the APA, which was in effect when Section 141(f) was enacted, Congress has expressly authorized the court to "hold unlawful and set aside" that action if it was "not in accordance with law," 5 U.S.C. § 706(2)(A), or taken "without observance of procedure required by law," *id.* § 706(2)(D). By the same token, the relief requested by Plaintiffs is not the filing of "a better report," as it was in *Guerrero* and *Hodel*. *Guerrero*, 157 F.3d at 1195. Instead, Plaintiffs ask the Court to set aside Secretary Ross's decision to add the question, which—as discussed above—will indeed redress their injuries caused by that decision.

There is a second critical difference between the situations in *Guerrero* and *Hodel* and the one here. In each of those cases, the challengers' contention was emphatically not that the relevant Executive Branch official had "failed entirely to report back to Congress," but rather that the statutorily mandated report had somehow been "inadequate." *Hodel*, 865 F.2d at 318-19; *see Guerrero*, 157 F.3d at 1194 (noting that "the only controversy is whether the [challenged] report was adequate and what kind of information must be provided in future reports"); *id.* at 1195 n.10.[63] Here, by contrast, the issue is not the adequacy of Secretary Ross's reports to Congress. Instead, given the undisputed omission of citizenship from the March 2017 "subjects" report, it is the fact that he "failed entirely" to submit the report required by Section 141(f)(3). *Hodel*, 865 F.2d at 318. Congress may be in a better position than the courts to evaluate whether a given report is adequate and to "take what it deems to be the appropriate action" if the report is not. *Id.* at 319. But there is no reason to believe that Congress is in a better position than the courts to determine whether a given report has been submitted at all; at most, that determination requires, as it does here, a construction of the relevant statute and a straightforward finding of fact, both matters well within the competence of courts.

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[63] In *Guerrero*, the plaintiffs initially brought claims based on the allegation that the Director of the Office of Insular Affairs had failed to file reports for certain years. *See* 157 F.3d at 1193. While the case was pending, however, the Director remedied that failure, *see id.*, thereby mooting those claims, *id.* at 1195 n.10. Thus, as in *Hodel*, the plaintiffs' challenge to the *adequacy* of the Director's reports was "the only remaining point in contention on appeal." *Id.*

Relatedly, while evaluating "[w]hether a report to Congress is sufficiently 'detailed'" may well involve an "inherently elusive" inquiry, *id.*, there is nothing complicated or elusive about the inquiry required here. Indeed, given the Court's construction of the statute (namely, that Secretary Ross's Section 141(f)(2) "questions" report does not, as a matter of law, qualify as a Section 141(f)(3) supplemental "subjects" report), it is undisputed that Secretary Ross failed entirely to file the report required by Section 141(f)(3). That, in turn, means that his decision to add a citizenship question to the census questionnaire was unlawful. *See Ctr. for Biological Diversity v. Brennan*, 571 F. Supp. 2d 1105, 1125 (N.D. Cal. 2007) (holding, in similar circumstances, that "[n]either *Hodel* nor *Guerrero* offer relief for the defendants. What was challenged in those cases was the adequacy or sufficiency of required reports; what is being challenged here is the *complete* failure to produce the Research Plan at all.").[64]

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[64] For similar reasons, the Court need not resolve the parties' disputes over (1) whether Secretary Ross would need to include in a Section 141(f)(3) report his statutorily mandated finding that "new circumstances exist which necessitate that the subjects" set forth in the Section 141(f)(1) report "be modified," 13 U.S.C. § 141(f)(3); and (2) whether Secretary Ross could make that finding given evidence in the record (albeit the trial record) that citizenship data acquired through the census is not "necessary" for enforcement of the VRA, *see* Gore Dep. 300 (Gore, the author of the Gary Letter, conceding that he does not believe that collection of CVAP data through the census is "necessary" for DOJ's VRA enforcement efforts). *Compare* Defs.' Post-Trial Br. 79, ¶ 64, *with* Docket No. 550, at 11-12. For purposes of this decision, all that matters is that Secretary Ross has not, to date, submitted a Section 141(f)(3) report. Whether he can do so between now and the census date, and what would need to be included in any such report, are questions for

In short, although the question is a close one, the Court concludes that, under the circumstances presented here, Secretary Ross's violation of Section 141(f) is judicially reviewable and that it provides an independent basis to set aside his decision to add a citizenship question to the 2020 census questionnaire. *See, e.g.*, *NRDC*, 894 F.3d at 108-13 (vacating an agency's order for failure to comply with a statutory deadline). Indeed, those conclusions follow from a straightforward application of Congress's own dictates in the Census Act and the APA. More fundamentally, they accord with "a basic element of our system of checks and balances": judicial review of final agency actions "affecting . . . the lives and liberties of the American people. This is fully in keeping with fundamental notions in our policy that the exercise of governmental power, as a general matter, should not go unchecked." *Hodel*, 865 F.2d at 318.

2. Secretary Ross's Decision Was Arbitrary and Capricious

Separate and apart from the fact that Secretary Ross's decision to add a citizenship question to the 2020 census was "not in accordance with" Sections 6(c) and 141, the decision would—and does—fail ordinary arbitrary-and-capricious review on its own terms, several times over. As noted, agency action is "arbitrary and capricious," and must be set aside, if the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference

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another day—and, for the reasons set forth in *Hodel* and *Guerrero*, may be questions for Congress, rather than a court, to answer.

in view or the product of agency expertise." *State Farm*, 463 U.S. at 43. Agency action is also arbitrary and capricious if it is not based on a "reasoned analysis" that indicates the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made," *id.* at 42-43 (citation and internal quotation marks omitted), or if the agency fails to adequately justify a departure from past practice, *see Mfrs. Ry. Co.*, 676 F.3d at 1096. In short, to survive arbitrary-and-capricious review, agency action must be "logical and rational." *Allentown Mack Sales & Service, Inc.*, 522 U.S. at 374. Secretary Ross's decision fails these standards for several independent reasons.[65]

a. Secretary Ross's Explanations Ran Counter to the Evidence Before the Agency

First, in a startling number of ways, Secretary Ross's explanations for his decision were unsupported by, or even counter to, the evidence before the agency. For instance, he sought to justify his decision on the ground that "no one provided evidence that reinstating a citizenship question on the decennial census would materially decrease response rates." AR 1317. But that

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[65] In the discussion that follows, the Court relies heavily on the Census Bureau's analyses of the effects of adding a citizenship question on the census questionnaire. It is important to note, however, that the Court's conclusions are not based on "the mere fact that the Secretary's decision overruled the views of some of his subordinates," which "is by itself of no moment in any judicial review of his decision." *Wisconsin*, 517 U.S. at 23. Instead, the Court's conclusions are based on the Court's determination that the Secretary's decision was irrational on its own terms and in light of the evidence before the Secretary at the time.

assertion is simply untrue. The Administrative Record is rife with both quantitative and qualitative evidence, from the Census Bureau itself, demonstrating that the addition of a citizenship question to the census questionnaire would indeed materially reduce response rates among immigrant and Hispanic households. *See, e.g.*, AR 1277, 1278; AR 5500, 5505-06; AR 10386. Most notably, by examining differential declines in self-response rates on past surveys and measuring differential sensitivity to citizenship inquiries as shown in item non-response rates and breakoff rates, the Census Bureau calculated in January 2018 that adding a citizenship question to the 2020 census was likely to lead to a 5.1% differential decrease in self-response rates among noncitizen households. AR 5505-06. That analysis and others like it are the *only* quantitative evidence in the Administrative Record on the effect of the citizenship question on response rates. That is, despite Secretary Ross's claim to the contrary, *see* AR 1315, 1318, there is no evidence in the Administrative Record supporting a conclusion that addition of the citizenship question will *not* harm the response rate.

That is just the tip of the iceberg. For instance:

- Secretary Ross claimed that the citizenship question is "no additional imposition" for "the approximately 90 percent of the population who are citizens" and "for the approximately 70 percent of non-citizens who already answer this question accurately on the ACS." AR 1317. But that claim is manifestly contrary to both evidence in the Administrative Record, *see* AR 1277, 1281, and common sense. Adding a question to a survey that is sent to every household

in the country "imposes" an additional burden—one question's worth, per person, per household—on every respondent. And that is true whether or not the respondent can answer the question by truthfully affirming that he or she is, in fact, a citizen of the United States and whether or not the respondent answered the question correctly on another survey.[66] *See* AR 1281 ("Survey methodologists consider burden to include . . . the direct time costs of responding. . . . "); 44 U.S.C. § 3502(2) (defining the term "burden," for purposes of the Paperwork Reduction Act, to mean "time, effort, or financial resources expended by persons to generate, maintain, or provide infor-

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[66] Secretary Ross's reference to "the approximately 70 percent of non-citizens who already answer this question accurately on the ACS" has its own share of problems. Ross Memo 5, at AR 1317. For one thing, nowhere near seventy percent of noncitizens answer the citizenship question accurately on the ACS; only about one in fifty households even receives the ACS. *See* Joint Stips. ¶ 40. For another, although the Census Bureau generally considers citizenship data derived from administrative records to be more accurate than citizenship data derived from self-response (thus, the Section 6(c) problem with Secretary Ross's decision), one cannot say, without additional data, that the thirty percent of respondents for whom there is a discrepancy between self-response and administrative records answered the question inaccurately on the ACS; the most that can be said is that there is a disagreement between the two sets of data. Thus, it is inaccurate to say that "approximately 70 percent of non-citizens . . . answer this question accurately on the ACS." Based on the Administrative Record, all that can be said is that approximately seventy percent of noncitizens *who respond to the ACS*—quite a small fraction of the population of noncitizens overall—provide a citizenship status that matches their status in administrative records.

mation to or for a Federal agency, including the resources expended for . . . reviewing instructions; . . . completing and reviewing the collection of information; and transmitting, or otherwise disclosing the information.").[67]

- Secretary Ross asserted that placing the citizenship question last on the census form will somehow "minimize any impact on decennial census response rates." AR 1320. But the Administrative Record includes no evidence whatsoever to support that assertion. And the assertion is based on a fundamental misunderstanding of the way the census is conducted. After all, respondents are directed to answer all questions on the questionnaire sequentially for each member of their household, which means that—in a multi-member household—a respondent would see the citizenship question when he or she answers as to the first member of the household before answering any questions about others.
- Secretary Ross stated that it was "difficult to assess" whether "non-response follow-up increases resulting from inclusion of the citizenship question would lead to increased costs." AR 1319. But the Administrative Record reflects that, prior to the March 2018 decision, the Census Bureau estimated that the expected self-response decline from adding a citizen-

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[67] Having erroneously assumed that no additional burden existed, Secretary Ross naturally also failed to analyze whether it was justified—and thus "failed to consider an important aspect of the problem," another APA violation. *State Farm*, 463 U.S. at 43.

> ship question would result in an increased cost of at least $27.5 million. *See* AR 1282.

Any one of these errors or overstatements would arguably support a finding that Secretary Ross's decision was arbitrary and capricious within the meaning of the APA. Taken together, they plainly do. *See, e.g., City of Kansas City, Mo. v. Dep't of Hous. & Urban Dev.*, 923 F.2d 188, 194 (D.C. Cir. 1991) ("Agency action based on a factual premise that is flatly contradicted by the agency's own record does not constitute reasoned administrative decisionmaking, and cannot survive review under the arbitrary and capricious standard."); *see also, e.g., Islander E. Pipeline Co., LLC v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 103 (2d Cir. 2006) (stating that courts should not defer to agency action where the record evidence "directly contradicts the unsupported reasoning of the agency and the agency fails to support its pronouncements with data or evidence"); *Choice Care Health Plan, Inc. v. Azar*, 315 F. Supp. 3d 440, 443 (D.D.C. 2018) (stating that, to survive review under the APA, "the facts on which the agency purports to have relied" must "have some basis in the record" (internal quotation marks omitted)); *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41, 68 (D.D.C. 2016) (reversing an agency decision that "ignore[d] critical context" and "cherry-pick[ed] . . . evidence").

And notably, the Court has not even gotten to the most significant way in which Secretary Ross's explanation for his decision ran counter to the evidence in the Administrative Record. Secretary Ross's own stated "priorit[y]" was to "obtain[] *complete and accurate data*." AR 1313; *see also id.* ("[I]t is . . . incum-

bent upon the Department and the Census Bureau to make every effort to provide a complete and accurate decennial census."). And his decision was explicitly based on the "judgment" that adding the question to the census "will provide DOJ with the most complete and accurate CVAP data in response to its request." *Id.* at 1317. He stated, for example, that "[t]he citizenship data provided to DOJ will be *more* accurate with the question than without it," *id.* at 1319 (emphasis added), and that adding a citizenship question was "*necessary* to provide complete and accurate data in response to the DOJ request," *id.* at 1320 (emphasis added). And he expressly found that the disadvantages of adding a question—most prominently, a reduction in the self-response rate—were "outweigh[ed]" by "the value of more complete and accurate data." *Id.* at 1319; *see id.* at 1317 ("I find that the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate."). The problem is that all relevant evidence in the Administrative Record establishes that adding a citizenship question to the census will result in *less* accurate and *less* complete citizenship data.

First, as discussed above in reference to Section 6(c), all of the relevant evidence before Secretary Ross —*all* of it—demonstrated that using administrative records (Alternative C) would actually produce more accurate block-level CVAP data than adding a citizenship question to the census (Alternative D). *See, e.g.*, AR 1277-78 (explaining that adding the citizenship question would result in "substantially less accurate citizenship status data than are available from administrative sources"); AR 1285 ("[T]he administrative records citi-

zenship data would most likely have both more accurate citizen status and fewer missing individuals than would be the case for any survey-based collection method."); AR 1293 ("Q: Is using sample data and administrative records sufficient for DOJ's request? A: The 2020 Census data combined with Alternative C are sufficient to meet DoJ's request. We do not anticipate using any ACS data under Alternative C."); AR 1312 ("Alternative D would result in poorer quality citizenship data than Alternative C."); AR 5475 ("Alternative C delivers higher quality data than Alternative B for DoJ's stated uses."). That is because, as Secretary Ross himself acknowledged, *see id.* at 1316, survey data regarding citizenship is highly suspect: People who are identified as noncitizens in administrative respond on surveys that they are citizens approximately thirty percent of the time. *See* AR 1283; AR 1311. And while it is true that Alternative C—using administrative records "alone"—would require the Census Bureau to "impute" the citizenship of a portion of the population, *see* Ross Memo 4, at AR 1316, Alternative D would rely on imputation (not to mention proxy response) as well, *see* AR 1305, 1307. The difference is that, in Alternative C, the missing citizenship data would be imputed from a more accurate source—namely, administrative records—than in Alternative D. *Id.*

Nor would adding the question to the census result in "more complete" citizenship data, whatever that may mean. It is certainly true that "[a]sking that citizenship question of 100 percent of the population gives each respondent the *opportunity* to provide an answer." Ross Memo 5, at AR 1317 (emphasis added). But Secretary Ross identifies no independent value, let alone one supported by a rational policy objective, in

providing an "opportunity" to respond if doing so does not yield more accurate and complete data. And the record is clear that many respondents will not take advantage of the opportunity (or, as discussed, will take advantage of it by providing inaccurate responses), forcing the Census Bureau to rely more heavily on NRFU operations, including proxy response and imputation, to fill in the missing data. *See, e.g.*, AR 1311. That result also undermines Secretary Ross's assertion that Alternative D "would maximize the Census Bureau's ability to match the decennial census responses with administrative records." Ross Memo 4, at AR 1316. As the Census Bureau itself made clear, adding a citizenship question will drive down the self-response rate and push more households into NRFU operations, which, in turn, produces "lower quality" personal identifying information. *See* AR 1311. That, in turn, will actually increase "the number of persons who cannot be linked to . . . administrative data." *Id.*

In short, Secretary Ross's decision is neither logical nor rational on its own terms. That is, "the reason" that he himself "gave for [his] action . . . makes no sense." *New England Coal. on Nuclear Pollution v. Nuclear Regulatory Comm'n*, 727 F.2d 1127, 1130-31 (D.C. Cir. 1984) (Scalia J.). Having articulated that his own "priorit[y]" was "obtaining *complete and accurate data*," Ross Memo 1, at AR 1313, and having made "completeness" and "accuracy" the dispositive criteria for his decision, *see id.* at 1316-17, Secretary Ross acted arbitrarily and capriciously by selecting an option that will produce *less* accurate and *less* complete citizenship data. That by itself renders his decision arbitrary and capricious. *See, e.g.*, *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 56 (2d Cir. 2003) (holding that the adoption

of a standard that permitted "plainly inferior" outcomes was arbitrary and capricious absent "satisfactory explanation" in the record); *see also, e.g.*, *State Farm*, 463 U.S. at 43 (stating that a decision is arbitrary when it is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise"); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) (explaining that an agency has an "obligation to explain its reasoning for rejecting" expert evidence contrary to its decision); *McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (stating that a court will "not defer to [an] agency's conclusory or unsupported suppositions").[68]

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[68] To be clear, the foregoing analysis relies solely on evidence in the Administrative Record, as the relevant question is whether Secretary Ross's explanations for his decision ran counter to the evidence that was "before the agency." *State Farm*, 463 U.S. at 43. That said, considering the extra-record evidence presented at trial would only strengthen the conclusion that Secretary Ross's decision was unsupported by evidence. Among other things, the evidence from trial establishes that the impact of the question on the self-response rates of immigrant and Hispanic households is likely to be even higher than 5.1%, *see, e.g.*, Brown Memo at 35, 38-39; Tr. 30, 50-51, 78-80, 881-82, 897, 919-20; that adding any question to the census imposes an incremental burden on respondents, *see, e.g.*, Habermann Aff. ¶¶ 22-25, 33; Pierce Aff. ¶ 9; Trial Tr. 43; and that the costs of adding the question are likely to be even higher than the Census Bureau's initial estimates, *see* Brown Memo at 43. More broadly, the trial record includes the credible and persuasive explanation of Defendants' own expert, Dr. Abowd, of why, using Secretary Ross's own criteria, Alternative C was superior to Alternative D. *See* Tr. 966-91, 1374-75.

b. Secretary Ross Failed to Consider Several Important Aspects of the Problem

Secretary Ross's decision was arbitrary and capricious for another reason: He "failed to consider" several "important aspect[s] of the problem." *State Farm*, 463 U.S. at 43. For starters, Secretary Ross failed to consider, let alone coherently address, whether it was necessary to respond to DOJ's request at all.[69] The March 26, 2018 Memorandum is premised on *DOJ*'s request to add a citizenship question to the decennial census questionnaire so as to obtain more granular CVAP data for use in the enforcement of the VRA. Ross Memo 1, at AR 1313. The Census Act, however, delegates the authority to obtain "other census information" to the Secretary of Commerce—not to DOJ—and authorizes the collection of such information (subject to limits found elsewhere in the statute, including Section 6(c)) only "as necessary." 13 U.S.C § 141(a). It does not permit the Secretary of Commerce to exercise that authority on an unreasoned whim or to outsource the decision that certain data is "necessary" to the unscrutinized discretion of another federal agency. But notably, Secretary Ross gave no reason at all—not even that it would be rude to refuse DOJ. Instead, he treated DOJ's request as conclusive with respect to whether he should exercise his authority to collect more granular citizenship data.[70] The Census Act and

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[69] Notably, Defendants conceded at oral argument that that there was no requirement—statutory, constitutional, or otherwise—that Secretary Ross respond to DOJ's request. Tr. 1534.

[70] To be sure, Secretary Ross did characterize Alternative A as a "rejection of the DOJ request" because it would not involve adding a citizenship question to the census. Ross Memo 2, at AR 1314.

the APA required more than that. *See, e.g., City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 & n.46 (D.C. Cir. 1987) (noting that "an agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives," and observing "that the failure of an agency to consider obvious alternatives has led uniformly to reversal" (citations and internal quotation marks omitted)); *Delaware Dep't of Nat. Res. & Envtl. Control*, 785 F.3d at 16 (stating that "[a]dministrative law does not permit" an agency to "dodge" its own responsibilities or "to excuse its inadequate responses by passing the entire issue off onto a different agency").

Making matters worse, there is no evidence in the Administrative Record that would support a finding that more granular CVAP data is "necessary" for enforcement of the VRA and plenty of evidence to the contrary. Conspicuously, the Gary Letter itself does not state that such data is "necessary" to enforce the VRA; indeed, it studiously avoids using the word "necessary" to describe the request for the data. *See* AR 663-65. Nor does it identify a single VRA case that DOJ failed to bring or lost because of inadequate block-level CVAP data. *See id.*[71] That omission is

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But that characterization is belied by Secretary Ross's own description of the option. As he himself explained, Alternative A involved deploying statisticians to assist DOJ in achieving more precise results using existing ACS CVAP data. *See id.* at 1314-15.

[71] The Gary Letter cites a handful of cases for the proposition that "where citizenship rates are at issue in a vote-dilution case, citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district." AR 663. But none of those cases even remotely suggest that it matters whether that CVAP data be derived

hardly surprising. After all, the VRA was enacted in 1965—*fifteen years after* a citizenship question last appeared on a census questionnaire sent to every household in the country. In other words, during the

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from "hard count" survey responses. To the contrary, those cases indicate that existing, sample-derived CVAP data (whether drawn from the ACS or from the long-form census) have generally been sufficient to enforce VRA claims. *See LULAC*, 548 U.S. at 423-42 (discussing the district court's factual findings based on then-existing CVAP data, and ultimately ruling in favor of the plaintiffs on their vote dilution claim); *Reyes v. City of Farmers Branch, Tex.*, 586 F.3d 1019, 1021-25 (5th Cir. 2009) (rejecting the plaintiffs' *district*-level CVAP data—derived from an independent estimate and the plaintiffs' own attempt to count, but not from the ACS—as inadequate); *Barnett v. City of Chicago*, 141 F.3d 699, 702-04 (7th Cir. 1998) (concluding that CVAP data is the proper basis for "determining equality of voting power" under the VRA while accepting the adequacy of the data in the record on that question and ruling in favor of one set of plaintiffs); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569-70 (11th Cir. 1997) (holding that CVAP data was the proper basis for considering the first *Gingles* factor, but accepting sample citizenship data as "reasonably accurate" even though it was only available at the census-block level); *Romero v. City of Pomona*, 665 F. Supp. 853, 857 n.2 (C.D. Cal. 1987) (rejecting a VRA claim upon consideration of *total* population data, the plaintiffs having conceded that they would lose if CVAP data were considered instead). Notably, none of those cases suggest that *block-level* CVAP data is necessary. Indeed, the only one of those cases to even address block-level CVAP data concluded that block-*group*-level CVAP data was sufficient, and expressly rejected the argument that "citizenship information . . . based upon a sample population" could not be used alongside "census data . . . based upon the entire population." *Negron*, 113 F.3d at 1569-70; *see id.* at 1570 ("The use of sample data is a long-standing statistical technique, whose limits are known and measurable. We will not reject the citizenship statistics solely because they are based on sample data without some indication that the sample was tainted in some way.").

entire fifty-four-year existence of the VRA, DOJ has never had "hard count" CVAP data from the decennial census. It did not have such data in 1965, when the VRA was first enacted; it did not have such data in 1982, when the VRA was amended to clarify the vote-dilution standard, *see* Pub. L. No. 97-205, 96 Stat. 131; and it did not have such data in 1986, when the Supreme Court articulated the still-operative vote-dilution test in *Gingles*, a case cited in the Gary Letter. AR 663. And if that point was not obvious to Secretary Ross from the historical record alone, as it should have been, it was made to him explicitly in multiple submissions from voting rights experts and other stakeholders that appear in the Administrative Record. *See, e.g.*, AR 798-800 (letter from the Leadership Conference on Civil and Human Rights); AR 1122-23 (letter from various Jewish organizations); AR 3605-06 (letter from the Constitutional Accountability Center on behalf of Asian Americans Advancing Justice, NAACP Legal Defense and Education Fund, and other organizations).

There is at least one more important aspect of the problem that Secretary Ross failed to consider: the effect of the Census Bureau's confidentiality obligations and disclosure avoidance practices on the fitness of decennial census citizenship data for DOJ's stated purposes.[72] To ensure that it complies with its statu-

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[72] To some extent, that failure is arguably manifest in the Administrative Record alone. Evidence in the Administrative Record notes that disclosure avoidance protocols would impact any CVAP data produced for DOJ. *See, e.g.*, AR 1292 (explaining that only data that has been "processed through the Bureau's disclosure avoidance procedures can be released for public use"); AR 2952

tory confidentiality obligations, the Census Bureau plans to apply disclosure avoidance protocols to every census block. *See* Tr. 1032-33, 1039-46; Census Bureau 30(b)(6) Dep. 50-51. That has two significant implications with respect to DOJ's purported desire for census-block CVAP data. First, it means that, even with a citizenship question on the census, there would not be a single census block (except for randomly) where citizenship data would actually reflect the responses of the block's inhabitants to the census questionnaire. *See* Census Bureau 30(b)(6) Dep. 67-68, 70-71; Tr. at 1033. Second, it means that block-level CVAP data based on responses to a citizenship question on the census would themselves be estimates, with associated margins of error, rather than a true or precise "hard count." *See* Tr. at 1043-44; Census Bureau

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(acknowledging that the Census Bureau will need to ascertain "how disclosure avoidance will be handled"); AR 6415 (discussing application of disclosure avoidance to a Census Bureau proposal to obtain CVAP information). Moreover, Dr. Abowd testified that he advised Secretary Ross about the issue in their February 12, 2018 meeting, *see* Tr. 1046-48, 1373, and, while no notes of that meeting exist (or at least have been disclosed), that advice should surely be deemed part of the "whole record" that was before the agency, 5 U.S.C. § 706; *see Portland Audubon Soc'y*, 984 F.2d at 1548 (stating that the "whole record" includes "everything that was before the agency pertaining to the merits of its decision"); *Sierra Club*, 657 F.2d at 402 (noting that excluding "oral communications of central relevance" to the EPA Administrator's decision from the record would improperly force the court to ignore "information central to the [Administrator's] justification" simply because it was "communicat[ed] . . . by voice rather than by pen"). In any event, for the reasons stated above, the Court may look to extra-record evidence in determining whether Secretary Ross failed to consider an important aspect of the problem before him. *See Asarco*, 616 F.2d at 1160.

30(b)(6) Dep. 53-56, 69-71, 100-01. As a matter of fact, the Census Bureau has not yet even determined if, after disclosure avoidance, the error margins for block-level CVAP data based on the census would "still allow redistricting offices and the Department of Justice to use the data effectively." *See* Census Bureau 30(b)(6) Dep. 101. Nor does it even know if the CVAP data produced by a citizenship question on the census would have smaller margins of error than the ACS-based CVAP data on which DOJ currently relies. *See id.*; Tr. 1044-46; *see also* Gore Dep. 225-28 (acknowledging that when he drafted the Gary Letter, AAAG Gore did know if citizenship data derived from the census would have smaller or larger margins of error, or would be any more precise, than citizenship data).

There is no indication that Secretary Ross considered any of this in deciding to add a citizenship question to the census; indeed, the words "disclosure avoidance" appear nowhere in his Memorandum. Ross Memo 5-8, at AR 1317-20.[73] On its own terms, that failure easily qualifies as arbitrary and capricious. *See, e.g.*, *Humane Soc'y of U.S. v. Zinke*, 865 F.3d 585, 606 (D.C. Cir. 2017) ("Despite immense losses in the gray wolves' historical range . . . the Service nowhere analyzed the impact of that loss on the survival of the gray wolves as a whole. . . . Such a failure to address 'an important aspect of the problem' that is factually

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[73] Nor did Secretary Ross consider whether adding a citizenship question would enable the Census Bureau to meet DOJ's stated desire for a single data set containing both population and citizenship data. *See* AR 664. Even now, the Census Bureau has not yet decided whether to include population and CVAP data in the same data set. *See* Defs.' Post-Trial Br. 55, ¶ 374.

substantiated in the record is unreasoned, arbitrary, and capricious decisionmaking." (quoting *State Farm*, 463 U.S. at 43)); *see also Prometheus Radio Project v. FCC*, 373 F.3d 372, 420-21 (3d Cir. 2004) (vacating an agency's repeal of a rule where the agency failed to consider or even acknowledge "the effect of its decision on minority television station ownership"); *Connecticut v. U.S. Dep't of Commerce*, No. 3:04-CV-1271, 2007 WL 2349894, at *12-13 (D. Conn. Aug. 15, 2007) (vacating an agency decision as arbitrary because, among other things, "the Secretary failed to address an important aspect of the problem because he effectively ignored the adverse effects on oysters," where "the destruction of oysters . . . is significant in balancing the adverse effects of the project against the national interest"). It is all the more arbitrary and capricious given that it casts grave doubt on the central premise of Secretary Ross's explanation for his decision: that adding a citizenship question to the census "will provide DOJ with the most complete and accurate CVAP data in response to its request." Ross Memo 5, at AR 1317.

c. Secretary Ross Failed to Justify Departures from the OMB Guidelines and the Census Bureau's Standards and Practices

As if that were not enough, Secretary Ross's decision was also arbitrary and capricious because, in multiple ways, it represented a dramatic departure from the standards and practices that have long governed administration of the census, and he failed to justify those departures. *See, e.g., St. Lawrence Seaway Pilots Ass'n, Inc. v. U.S. Coast Guard*, 85 F. Supp. 3d 197, 207 (D.D.C. 2015) (holding that an agency's unsupported departure from prior practice was arbitrary and

capricious); *Tummino v. Torti*, 603 F. Supp. 2d 519, 523 (E.D.N.Y. 2009), *amended sub nom. Tummino v. Hamburg*, No. 05-CV-366 (ERK), 2013 WL 865851 (E.D.N.Y. Mar. 6, 2013) (holding that agency action was arbitrary and capricious in part because it had "departed in significant ways from [its] normal procedures"); *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("T]he requirement that an agency provide reasoned explanation for its action . . . ordinarily demand[s] that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."); *SNR Wireless LicenseCo, LLC v. FCC*, 868 F.3d 1021, 1029 (D.C. Cir. 2017) ("To provide a satisfactory explanation, an agency must acknowledge and explain any departure from its precedents."); *Hooper v. Nat'l Transp. Safety Bd.*, 841 F.2d 1150, 1151 (D.C. Cir. 1988) (holding that the failure to enforce a procedural rule uniformly is arbitrary and capricious). Making matters worse, not only did Secretary Ross fail to justify these departures, but he and his aides took active steps to downplay, if not conceal, them from scrutiny.

For starters, the Census Bureau's conduct of the census is governed by various federal standards that generally call for, among other things, burden-reduction, cost-minimization, and pretesting of statistical data collection instruments, including the decennial census. First, the Paperwork Reduction Act, 44 U.S.C. §§ 3501 *et seq.*, tasks OMB with coordinating the federal statistical system and establishing government-wide guidelines and policies regarding statistical collection methods. *See id.* §§ 3501(9), 3504(a)(1)(B)(iii), 3504(e). The purposes of the Act are, among other things, to "mini-

mize the paperwork burden . . . resulting from the collection of information by or for the Federal Government"; to "ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government"; and to "minimize the cost to the Federal Government of the creation, collection, maintenance, use, dissemination, and disposition of information." *Id.* § 3501(1), (2), (5); *see also id.* § 3502(2) (providing, in relevant part, that "the term 'burden' means time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency").

As discussed above by way of background, in line with these statutory obligations, OMB has published a number of "Statistical Policy Directives" that govern data collection by the Census Bureau and other federal statistical agencies. *See* Statistical Policy Directive No. 1: Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units, 79 Fed. Reg. 71610 (Dec. 2, 2014); PX-359 (Statistical Policy Directive No. 2); PX-360 (Addendum to Statistical Policy Directive No. 2). To the extent relevant here, Statistical Policy Directive ("SPD") No. 1, titled *Fundamental Responsibilities of Federal Statistical Agencies and Recognized Statistical Units*, requires the Census Bureau to "[c]onduct objective statistical activities" by "produc[ing] data that are impartial, clear, and complete and are readily perceived as such by the public." 79 Fed. Reg. at 71615. Meanwhile, SPD No. 2, titled *Standards and Guidelines for Statistical Surveys*, provides, among other things, that federal statistical agencies "must design and administer their data collection instruments and methods in a

manner that achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost." PX-359, at 16, § 2.3; *accord id.* at 13, § 1.3 (requiring an agency to "design the survey to achieve the highest practical rates of response, commensurate with the importance of survey uses, respondent burden, and data collection costs). Another provision of SPD No. 2 requires agencies to "pretest" survey systems, and notes in particular that "[a] complete test of all components (sometimes referred to as a dress rehearsal) may be desirable for highly influential surveys." *Id.* at 14, § 1.4.

As noted above as well, the Census Bureau has adopted its own set of "Statistical Quality Standards," which are binding on "[a]ll Census Bureau employees." PX-260, at ii. The express goals of the Standards are "to promote quality in [the Census Bureau's] information products and the processes that generate them" and to "provide a means to ensure consistency in the processes of all the Census Bureau's program areas, from planning through dissemination." *Id.* at i. To that end, Requirement A2-3 provides that "[d]ata collection instruments and supporting materials must be developed and tested in a manner that balances (within the constraints of budget, resources, and time) data quality and respondent burden." *Id.* at 7. Sub-Requirement A2-3.3 further states that "[d]ata collection instruments and supporting materials must be pretested with respondents to identify problems (e.g., problems related to content, order/context effects, skip instructions, formatting, navigation, and edits) and then refined, prior to implementation, based on the pretesting results." *Id.* at 8. It provides for only two exceptions to that requirement. First, "[o]n rare occasions, cost or schedule constraints

may make it infeasible to perform complete pretesting," in which case "the program manager must apply for a waiver." *Id.* Second, "[p]retesting is not required for questions that performed adequately in another survey." *Id.*

The Administrative Record alone reveals that Secretary Ross—without any, let alone adequate, justification—failed to comply with the foregoing Statistical Policy Directives and Quality Standards, not to mention the historical practices that have long conformed to them. Most glaringly, Secretary Ross's decision to add the question violates every component of OMB's SPD No. 2, which mandates that the Census Bureau "design and administer" the census "in a manner that achieves the best balance between maximizing data quality and controlling measurement error while minimizing respondent burden and cost." PX-359, at 16, § 2.3. Since, as discussed above, Secretary Ross selected an option that is less accurate and less complete than an alternative that was presented to him, it goes without saying that his decision did not constitute "the *best* balance between maximizing data quality and controlling measurement error." *Id.* (emphasis added). Nor can it be said that he "minimize[d] respondent burden and cost," since, as discussed above as well, adding a citizenship question to the census increases the burden on every household in the country and, by the Census Bureau's own calculations, would increase the costs of administering the census by tens of millions of dollars. In short, Secretary Ross's decision falls short on *all four* criteria set forth in SPD No. 2's Section 2.3—maximizing data quality, controlling measurement error, minimizing respondent burden, and mini-

mizing cost. Secretary Ross's failure to justify that departure qualifies as arbitrary and capricious.

Secretary Ross's decision departed without adequate justification from the Census Bureau's own Statistical Quality Standards and practices as well. As noted, the Standards require pretesting of new questions, except in two circumstances: first, where "cost or schedule constraints . . . make it infeasible," in which case a "waiver" is required; or second, where the question "performed adequately in another survey." PX-260, at 8. But there is no indication in the Administrative Record that the Census Bureau applied for, let alone received, a waiver. (And even if it had, Secretary Ross could hardly contend that "cost or schedule constraints" made pretesting infeasible, as any such constraints were a product of his own making—the Census Bureau would have had ample time to conduct thorough pretesting had Secretary Ross shared in early 2017 that he was considering the issue. *See, e.g.*, *N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) (rejecting an agency's attempt "to excuse its violation of the APA by pointing to the problems created by its own delay")). And second, the Administrative Record—indeed, Secretary Ross's own Memorandum—establishes that the citizenship question has not "performed adequately" on the ACS. After all, analyses indicate that noncitizens "inaccurately mark 'citizen' about 30 percent of the time" on the ACS. Ross Memo 4, at AR 1316. Notably, Secretary Ross nowhere stated in his Memorandum that the question has "performed adequately" on the ACS. He did say the question had "been well tested." *Id.* at AR 1314. But "well tested" and "performed adequately" are not synonyms. And in any event, given both the differ-

ences between the ACS and the decennial census, and the Census Bureau's own Standards and practices calling for pretesting of any new question in the context of the whole proposed questionnaire, there is no basis even to call the question "well tested."[74]

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[74] Once again, the foregoing analysis relies solely on evidence in the Administrative Record. But once again, considering the extra-record evidence presented at trial would only strengthen the conclusion that Secretary Ross deviated from Census Bureau standards and practices without adequate justification. Among other things, the evidence from trial establishes that the Census Bureau has a rigorous pretesting protocol for any proposed changes to the census and typically spends years—in some cases, *up to a decade*—testing any proposed changes to the questionnaire, *see* Thompson Decl. ¶¶ 48-54; Habermann Aff. ¶¶ 44-46; Tr. 167; that the Census Bureau had explicitly adopted a plan for the 2020 census that required rigorous pretesting of any new questions, *see* PX-271, at 4; that the Census Bureau did not obtain a waiver from the pretesting requirement, *see* Tr. 1278; and that Defendants' own expert, Dr. Abowd, agreed that the citizenship question has not "performed adequately" on the ACS, *see* Tr. 1282, 1287-88. Notably, the record includes testimonials from *dozens* of experts in relevant fields that the citizenship question has not been adequately tested for inclusion in the decennial census questionnaire. *See, e.g.*, Tr. 157, 169-70, 737; Thompson Decl. ¶¶ 48-55, 92; Habermann Aff. ¶¶ 42, 59, 63; AR 8555 (letter from six former Directors of the Census Bureau); PX-539 (report of the National Academics of Sciences, Engineering, and Medicine's Committee on National Statistics Task Force on the 2020 Census); Brief of the American Statistical Association et al. as *Amici Curiae* Supporting Plaintiffs, Docket No. 420-1. In fact, Defendants' own expert, Dr. Abowd, testified—in both an individual capacity and as the official representative of the Census Bureau—that the citizenship question has not been adequately tested in the context of the decennial census. *See* Census Bureau 30(b)(6) Dep. 142-43; Tr. 1330. Defendants failed to proffer a single expert willing to opine that the citizenship question has been adequately for inclusion on the decennial census.

Conspicuously, Defendants barely even try to argue that Secretary Ross's decision was made in compliance with OMB's Statistical Policy Directives and the Census Bureau's Statistical Quality Standards. Instead, they have made two arguments.[75] First, in their pretrial briefing, they argued that "[t]he process that Plaintiffs claim was not followed was developed for the [ACS]." Defs.' Pretrial Reply Br. 5. Stating that the ACS is "a different instrument with different considerations and goals," Defendants contended that they "reasonably determined that the ACS process did not apply to the decennial census here. Accordingly, the Secretary did not act arbitrarily by following a more informal process." *Id.* at 5-6. Putting aside whether Defendants have abandoned this argument as it does not appear in their extensive post-trial briefing, it is, of course, close to a concession that Secretary Ross acted in an arbitrary and capricious manner by relying on testing done for the purpose of the ACS (a conclusion for which there is plenty of evidence anyway). But the argument fails on its own terms for at least three reasons. First, the argument is a belated concoction of counsel; it appears nowhere in the Ross Memo or otherwise in the Administrative Record. Second, the argument finds no basis in the Census Bureau's Statis-

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[75] Defendants also contend that making changes to the census questionnaire without extensive pretesting "is not unprecedented," citing a question regarding Hispanic origin on the 1970 census long-form questionnaire and a question regarding race on the 1990 census short-form questionnaire. Defs.' Post-Trial Br. 61, ¶ 419. But those situations are distinguishable on multiple grounds. *See* Pls.' Proposed Findings ¶¶ 275-91. Most significantly, the Census Bureau's Statistical Quality Standards were not in effect at the time. *See* PX-260, at 4.

tical Quality Standards. To the contrary, the Quality Standards explicitly apply "to all information products released by the Census Bureau and the activities that generate those products," which includes both the ACS *and* the decennial census. PX-260, at 6; *accord id.* at ii. And third, the argument does not pass the laugh test. The constitutionally mandated, once-in-a-decade census, which is used for many purposes, including apportionment of Representatives in Congress, is plainly more consequential than the annual ACS. Thus, if anything, the process used to vet any proposed changes to the decennial census questionnaire should be *more* rigorous than the process used to vet proposed changes to the ACS questionnaire.

In a last-ditch attempt to defend Secretary Ross's departures from the Census Bureau's well-established standards and practices, Defendants also contended at oral argument that the Statistical Quality Standards are not binding on the Secretary himself, citing *Comcast Corp. v. FCC*, 526 F.3d 763 (D.C. Cir. 2008). *See* Tr. 1458-59. But that argument is unavailing for four independent reasons. First, Defendants did not make the argument in either their pre-trial or post-trial briefs and, thus, waived it. *See, e.g.*, *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived. . . . "). Second, Defendants have never disputed that OMB's Statistical Policy Directives (or the Paperwork Reduction Act itself), as distinct from the Census Bureau's standards, are binding on the Secretary; to the contrary, Defendants acknowledge that "each" of the "OMB Statistical Policy Directives . . . applies to the Census Bureau." Defs.' Post-Trial Br. 60, ¶ 412: *see* 44 U.S.C. § 3518(a) ("Except as otherwise provided in

this subchapter, the authority of an agency under any other law to prescribe policies, rules, regulations, and procedures for Federal information resources management activities is subject to the authority of the Director. . . . "); *United States v. Nixon*, 418 U.S. 683, 696 (1974) ("So long as [a] regulation remains in force the Executive Branch is bound by it. . . . "). Third, it is far from clear that *Comcast* even applies here. The issue there was whether the Federal Communications Commission was bound by decisions of its Media Bureau that had not been appealed to, let alone adopted by, the Commission itself. The Court held that it was not, reaffirming "that an agency is not bound by the actions of its staff if the agency has not endorsed those actions." *Comcast*, 526 F.3d at 769 (internal quotation marks omitted). The Census Bureau's Statistical Quality Standards are very different from the Media Bureau decisions at issue in *Comcast*. They were the product of a formal rule-making-type process, *see* 67 Fed. Reg. 38467 (June 4, 2002), and have been "endorsed" by the Commerce Department —as demonstrated by the consistent adherence to them until Secretary Ross's decision. Finally, even if the Standards (or OMB's Directives, for that matter) were not technically binding on Secretary Ross (or subject to judicial review), they are consistent with the standards prevailing in the fields of survey design and administration and were before Secretary Ross at the time he made his decision. Thus, they are independently relevant to the analysis of whether his decision was substantively reasonable as the APA requires. *See, e.g.*, *Mobil Pipe Line Co. v. FERC*, 676 F.3d 1098, 1103 n.2 (D.C. Cir. 2012) (Kavanaugh, J.) (relying on "the economic and legal analysis of FERC's expert staff," even

though it was not formally binding on the Commission, because the Court found it "so persuasive").[76]

One other departure from standard operating procedures warrants brief mention—although whether it would be enough on its own to render Secretary Ross's decision arbitrary and capricious is a close question, if only because the record is scant on whether he himself knew of the departure. As detailed in the Administrative Record, when an agency requests data, it is standard operating procedure for the Census Bureau to meet with that agency to discuss the request, to drill down into the details of the data use, and to consider how best to meet the need presented. *See* AR 3289, 5489-91, 8651; *see also* Recitation of Facts ¶¶ 1[illegible] 23. Consistent with that practice, the Census Bureau advised DOJ that it had a less burdensome proposal for meeting DOJ's purported need for CVAP data and reached out repeatedly to DOJ to set up a meeting between

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[76] Arguably, Defendants would have been on firmer ground contending that the Court should not consider OMB's Statistical Policy Directives (as opposed to the Census Bureau's Standards), either on ripeness or reviewability grounds. *See* 44 U.S.C. § 3507(d)(6) ("The decision by the [OMB] Director to approve or not act upon a collection of information contained in an agency rule shall not be subject to judicial review."); *see also, e.g.*, *Tozzi v. EPA*, 148 F. Supp. 2d 35, 47 (D.D.C. 2001) (holding that the EPA's submission to OMB of an Information Collection Request under the Paperwork Reduction Act is not judicially reviewable because the OMB Director's eventual decision would not be reviewable). But they conspicuously failed to make that argument. And, in any event, the extent to which Secretary Ross departed without explanation from the Statistical Policy Directives is relevant to the Court's evaluation of the substantive reasonableness of Secretary Ross's decision, whether or not compliance with the Directives (or lack thereof) is independently reviewable by the Court as a technical matter.

their respective experts. *See* AR 3289, 8651. But DOJ rebuffed those requests. *See* AR 3460, 5489, 8651, 9074. Thus, there is no evidence in the Administrative Record that DOJ was apprised of the high inaccuracy rate of citizenship survey responses or of the potential implications of disclosure avoidance protocols for block-level CVAP data. That would be bad enough, but the trial record reveals that DOJ's refusal to meet with the Census Bureau was virtually unprecedented—particularly since it was done at the direction of the Attorney General himself. Gore Dep. 274; Tr. 963-65. Dr. Abowd testified at trial that he was not aware of a single other circumstance in which a Cabinet Secretary had personally directed agency staff not to meet with the Census Bureau. Tr. 964-65. And he opined—without doubt, correctly—that the Attorney General's involvement violated fundamental principles designed to ensure that federal statistical agencies conduct their work independent of political and other undue external influence. *See* Tr. 1265-68; PX-355, at 3; *see also* 79 Fed. Reg. at 71612 ("A Federal statistical agency must be independent from political and other undue external influence in developing, producing, and disseminating statistics.").

3. Secretary Ross's Rationale Was Pretextual

Finally, and perhaps most egregiously, the evidence is clear that Secretary Ross's rationale was pretextual—that is, that the real reason for his decision was something other than the sole reason he put forward in his Memorandum, namely enhancement of DOJ's VRA enforcement efforts. As the Court noted above, judicial review of agency action "requires that the grounds upon which the . . . agency acted be clearly dis-

closed." *Chenery I*, 318 U.S. at 94; *accord Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167-68 (1962) (stating that an agency must "disclose the basis of its" action). Absent compliance with this basic requirement, a reviewing court would be unable to measure agency action against the relevant governing standard. *Cf., e.g., U.S. Lines, Inc. v. Fed. Mar. Comm'n*, 584 F.2d 519, 533 (D.C. Cir. 1978) (observing that the court could not "determine whether the final agency decision reflect[ed] the rational outcome of the agency's consideration of all relevant factors," as required by the APA, because it "ha[d] no idea what factors . . . were in fact considered by the agency").

It follows that a court cannot sustain agency action founded on a pretextual or sham justification that conceals the true "basis" for the decision. Indeed, any other rule would deprive the words "basis," "grounds," and "disclose" of any force or meaning. Notably, Defendants do not argue otherwise; in fact, they expressly conceded (and thus have waived any argument to the contrary) that if the Court were to find that Secretary's "stated rationale [was] pretextual," APA relief must follow. May 9 Conf. Tr. 15. That concession was prudent, as courts have not hesitated to find that reliance on a pretextual justification violates the APA. *See, e.g., Woods Petroleum Corp.*, 18 F.3d at 859 (setting aside agency action because the "sole reason" for the action was "to provide a pretext" for the agency's "ulterior motive"); *Home Box Office*, 567 F.2d at 54-55 ("[W]here . . . an agency justifies its actions by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted pro-

perly, but must treat the agency's justifications as a fictional account of the actual decisionmaking process and must perforce find its actions arbitrary." (internal citations omitted)); *Tummino v. Torti*, 603 F. Supp. 2d 519, 544-46 (E.D.N.Y. 2009) (finding agency action to be arbitrary and capricious when its articulated basis was "fanciful and wholly unsubstantiated" and other, impermissible considerations were evident from the record).

In light of that well-established law, the Court's conclusion that Secretary Ross made the decision to add a citizenship question well before he received DOJ's request and for reasons unrelated to the VRA, *see* Recitation of Facts ¶¶ 167-84, provides yet one more independent basis for vacating and setting aside his decision. As discussed above, that conclusion is supported by evidence in the Administrative Record alone, including evidence that Secretary Ross had made the decision to add the citizenship question well before DOJ requested its addition in December 2017, AR 3702, 3710, 12476; the absence of any mention, *at all*, of VRA enforcement in the discussions of adding the question that preceded the Gary Letter, *see* AR 763-64, 2424, 2458, 2521-23, 3710, 3984, 4004; unsuccessful attempts by Commerce Department staff to shop around for a request by another agency regarding citizenship data, AR 12755-56; and Secretary Ross's personal outreach to Attorney General Sessions, followed by the Gary Letter, AR 2528, 2636, 4004; *see* AR 1321; not to mention the conspicuous procedural irregularities that accompanied the decision to add the question. When one considers evidence outside the Administrative Record, as the Court may do for this purpose, *see, e.g.*, *Overton Park*, 401 U.S. at 420, the con-

clusion is inescapable. That record includes the testimony from Comstock all but admitting that Secretary Ross had made up his mind to add the citizenship question in the spring of 2017, Comstock Dep. 146; testimony that senior aides to Secretary Ross had no idea why he decided to add the question, *see id.* at 112; Teramoto Dep. 32; a near-admission from Comstock that he went searching for a request from other agencies because the Commerce Department "would need to clear certain legal thresholds" to add the citizenship question that it otherwise would not be able to, and that it was his role to "find the best rationale" to support the addition of the question, Comstock Dep. 153-55, 266-67; and testimony from AAAG Gore that conversations between DOJ and the Commerce Department about adding a citizenship question were not initiated by DOJ, Gore Dep. 67.

Significantly, the record also includes evidence of the many ways in which Secretary Ross and his aides sought to conceal aspects of the process. *See* Recitation of Facts ¶ 184. In various contexts, courts frequently rely on evidence of false or misleading statements to draw inferences of pretext. In the employment setting, for example, it is well established that a factfinder "can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up" an ulterior purpose. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000); *see St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may . . . suffice to show intentional discrimination."); *Stratton v. Dep't for the Aging for New York*, 132 F.3d 869, 880-81 (2d Cir.

1997) (holding that evidence of an employer's false explanation for employment action supported the jury's finding of unlawful pretext); *see also, e.g.*, *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005) ("If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*'s third step."). And in the criminal context, courts frequently refer to false exculpatory statements as evidence of consciousness of guilt. *See, e.g.*, *United States v. Reyes*, 302 F.3d 48, 56 (2d Cir. 2002) ("[I]t is reasonable to infer guilty knowledge from [the defendant's] false exculpatory statement."). These inferences are "consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as affirmative evidence of guilt." *Reeves*, 530 U.S. at 147 (internal quotation marks omitted). Applying that common-sense evidentiary principle here, the Court can—and, in light of all the evidence in the record, does—infer from the various ways in which Secretary Ross and his aides acted like people with something to hide that they *did* have something to hide.

The Court does not make the finding that Secretary Ross failed to disclose his true rationale lightly. As Defendants note, the decisions of Executive Branch officials are undoubtedly subject to a "presumption of regularity." *See* Defs.' Post-Trial Br. 65, ¶ 440; *accord id.* at 87-88, ¶ 447.[77] By definition, however, a "pre-

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[77] Conspicuously, Defendants do not cite any case holding that the presumption of regularity applies to a court's substantive review under the APA. In their brief to this Court, Defendants cite

sumption" can be rebutted by evidence. *See, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 811 (2011) (noting that a presumption is "just that," and may be "rebutted by appropriate evidence"). And courts have long held that the presumption of regularity may be rebutted on a sufficiently strong showing of "bad faith or improper behavior." *Nat'l Nutritional Foods Ass'n*, 491 F.2d at 1145 (internal quotation marks omitted) (Friendly, J.). Here, for the

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a FOIA case, *see Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (2004), and a case noting (in a footnote) only that an agency is presumed, absent a "showing" to the contrary, to have considered all evidence in the record when making a determination, *see J. Andrew Lange, Inc. v. FAA*, 208 F.3d 389, 394 n.7 (2d Cir. 2000). *See* Defs.' Post-Trial Br. 87-88, ¶ 447. Even more curiously, in their recent brief in the Supreme Court, Defendants cite cases addressing selective-prosecution claims, *see United States v. Armstrong*, 517 U.S. 456, 464 (1996), and whether Executive branch officials are immune from suits for money damages brought against them in their individual capacities, *see Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). *See* Brief for the Petitioners at 22-23, *Dep't of Commerce v. U.S. Dist. Ct. for S.D.N.Y.*, (Dec. 17, 2018) (No. 18-557), 2018 WL 6650094, at *22-23. It is far from clear, however, that these authorities call for any sort of heightened deference here, given both the APA and the nature of, and limits on, the Secretary's authority with respect to the census. *See also Tecom, Inc. v. United States*, 66 Fed. Cl. 736, 757-68 (Fed. Cl. 2005) (exhaustively tracing the origins of the presumption of regularity and questioning whether it is anything more than a reaffirmation of the principle that the plaintiff bears the burden of proving that challenged conduct was unlawful). In fact, one of the cases cited by Defendants themselves holds that the strength of the presumption depends on context and that, in the case of some statutes, a "less stringent standard" applies because it "is more faithful to the statutory scheme." *Favish*, 541 U.S. at 174. Be that as it may, the Court assumes *arguendo* that a robust version of the presumption of regularity applies to Secretary Ross's decision here.

reasons discussed above, the Court is compelled to conclude that the presumption of regularity has been rebutted.

Aside from taking refuge in the presumption of regularity and minimizing the evidence of pretext, Defendants make two principal arguments in response to Plaintiffs' claim of pretext. First, they contend that Plaintiffs failed to prove that Secretary Ross "acted with an unalterably closed mind." Defs.' Post-Trial Br. 75, ¶ 49. Although not clear from Defendants' briefing in this Court, that purported standard appears to come from the D.C. Circuit's decision in *Mississippi Comm'n on Envtl. Quality* v. *EPA*, 790 F.3d 138, 183-84 (D.C. Cir. 2015) (per curiam).[78] But that standard has heretofore been applied only to the question of whether a decision-maker should have been disqualified from the rulemaking process. *See id.* at 183; *see also, e.g.*, *Air Transport Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 486-88 (D.C. Cir. 2011); *PLMRS Narrowband Corp. v. FCC*, 182 F.3d 995, 1002 (D.C. Cir.

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[78] Defendants cited *Mississippi Commission on Environmental Quality* in their Supreme Court petition, *see* Petition for a Writ of Mandamus at 20, *Dep't of Commerce v. U.S. Dist. Ct. for S.D.N.Y.* (Oct. 29, 2018) (No. 18-557), 2018 WL 5617904, at *20, and when pressed at oral argument for authority supporting the standard—because none was cited in Defendants' post-trial briefing—defense counsel invoked the petition. *See* Tr. 1507 ("I believe the Supreme Court petition cited a D.C. Circuit case . . . I'm sorry. I don't have that case handy, but that was one of the cases that the [S]olicitor [G]eneral has cited in that petition, arguing that standard."). Defendants cite the case as well in their Supreme Court merits brief. *See* Brief for the Petitioners at 33, *Dep't of Commerce v. U.S. Dist. Ct. for S.D.N.Y.* (Dec. 17, 2018) (No. 18-557), 2018 WL 6650094, at *33.

1999). Defendants cite no case—to this Court or the Supreme Court—applying the standard to the question presented here: whether an agency head's decision should be vacated under the APA because his stated rationale was not his real rationale. Nor could they because, as noted, Defendants have explicitly *conceded* throughout this litigation that if Secretary Ross's rationale was pretextual, then Plaintiffs are entitled to relief under the APA. *See* May 9 Conf. Tr. 15.

In any event, the evidence summarized above amply supports the conclusion that Secretary Ross did act with an "unalterably closed mind" in that he was "unwilling or unable to rationally consider arguments." *Mississippi Comm'n on Envtl. Quality*, 790 F.3d at 183 (internal quotation marks omitted). It shows that Secretary Ross had decided to add the question for reasons entirely unrelated to VRA enforcement well before he persuaded DOJ to make its request. And it *certainly* shows that he was either "unwilling or unable to rationally consider" arguments against the question after he received DOJ's request, when he was allegedly engaged in the "comprehensive review" that led to his final decision. Ross Memo 1, at AR 1313. For one thing, given the extraordinary lengths to which Secretary Ross and his aides went to generate a request for the question, it is hard to imagine he would have been open to putting the brakes on his quest once he had finally succeeded in getting the request he felt he needed. For another, a decision-maker who was fairly and honestly considering the evidence before him would have been more likely to heed the legal obstacles in his path, including Sections 6(c) and 141(f), OMB's Statistical Policy Directives, and the Census Bureau's own pretesting requirements than Ross was; more

likely to hesitate in the face of near uniform opposition to the request from stakeholders (notwithstanding an explicit effort to drum up support from outside groups); more likely to hit the pause button when experts at the Census Bureau warned that adding the question would increase the burden on respondents, harm the accuracy of the census count, and result in enormous extra costs, without providing as accurate and complete CVAP data as alternatives; and more likely to engage in, and encourage, dialogue with DOJ about whether there were other, less harmful ways to satisfy its purported needs. Secretary Ross's insistence on adding the question despite all of these obstacles and objections is strong evidence that he was unwilling or unable to rationally consider counterarguments to his plan once he had secured the request he felt he needed. *Cf., e.g., Davis v. Mineta*, 302 F.3d 1104, 1112-13 (10th Cir. 2002) (granting relief on the ground that the agency had prejudged the decision at issue and conducted "an evidently *pro forma* public opportunity to comment"), *abrogated on other grounds by Dine Citizens Against Ruining our Env't v. Jewell*, 839 F.3d 1276 (10th Cir. 2016); *Tummino v. von Eschenbach*, 427 F. Supp. 2d 212, 233-34 (E.D.N.Y. 2006) ("[T]hat the FDA's decisionmaking processes were unusual in four significant respects satisfies the court that the necessary showing of bad faith . . . has been made.").

Defendants' second argument accepts that Secretary Ross had other, unstated reasons for his decision. Relying on *Jagers v. Federal Crop Insurance Corp.*, 758 F.3d 1179, 1186 (10th Cir. 2014), they argue that, so long as Secretary Ross "actually believe[d] the rationale set forth in his decision memorandum," it does not matter if he "had *additional* reasons for reinstating a

citizenship question." Defs.' Post-Trial Br. 75-76, ¶ 49. But *Jagers* is easily distinguished, as the agency's decision in that case, unlike the decision at issue here, was supported by "objective scientific evidence," and the challengers there, unlike Plaintiffs here, had provided "neither evidence nor argument to call the validity of this scientific evidence into question." 758 F.3d at 1185. Moreover, in *Jagers*, unlike here, there was no evidence of improper "external political pressures." *Id.* In any event, the presumption of regularity aside, there is no basis in the record to conclude that Secretary Ross "actually believe[d]" the rationale he put forward, Defs.' Post-Trial Br. 75, ¶ 49, and a solid basis to conclude that he did not. And while there may well be, as Defendants assert, "myriad" other "legitimate reasons more-precise citizenship data could prove useful to both the federal and state governments," Docket No. 412, at 30; *accord* Defs.' Post-Trial Br. 65, ¶ 441, the fact of the matter is that Secretary Ross did not articulate even one. To the contrary, he cited one and only one rationale—DOJ's request for more granular CVAP data to enhance VRA enforcement—in his decision memorandum, and he affirmatively testified before Congress, under oath, that DOJ's request was the "sole[]" reason for his decision. *See Hearings Before Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Comm. on Appropriations*, 115th Cong. 15 (2018) (admitted as an audio file at PX-491).

In sum, the evidence in the Administrative Record and the trial record, considered separately *or* together, establishes that the sole rationale Secretary Ross articulated for his decision—that a citizenship question is needed to enhance DOJ's VRA enforcement efforts—was pretextual. Because Secretary Ross's stated ra-

tionale was not his actual rationale, he did not comply with the APA's requirement that he "disclose the basis of [his]" decision. *Burlington Truck Lines, Inc.*, 371 U.S at 167-68 (internal quotation marks omitted). As Defendants themselves have conceded, *see* May 9 Conf. Tr. 15, that by itself entitles Plaintiffs to relief under the APA. *See, e.g., Woods Petroleum Corp.*, 18 F.3d at 859-60; *Latecoere Int'l, Inc. v. U.S. Dep't of the Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994) (noting that "proof of subjective bad faith" by decisionmakers, including "predetermining" the awardee of a government contract, calls for relief under the APA); *XP Vehicles, Inc. v. Dep't of Energy*, 118 F. Supp. 3d 38, 79 (D.D.C. 2015) (holding that the plaintiff had stated an APA claim based in part on allegations that the agency had proffered a pretextual reason for its decision).

THE DUE PROCESS CLAUSE CLAIM

That leaves the claim—pressed only by the NGO Plaintiffs—that Defendants violated the equal protection component of the Fifth Amendment's Due Process Clause by "act[ing] with discriminatory intent toward Latinos, Asian-Americans, Arab-Americans, and immigrant communities of color generally in adding the citizenship question to the Decennial Census." NGO Compl. ¶¶ 193-200; *see* Pls.' Proposed Conclusions ¶¶ 487-613. As the Court noted at the outset, having found that Plaintiffs are entitled to relief under the APA, it would not normally proceed to consider, as an alternative, their claim under the Constitution. *See, e.g., Anobile v. Pelligrino*, 303 F.3d 107, 123 (2d Cir. 2001) ("Principles of judicial restraint caution us to avoid reaching constitutional questions when they are unnecessary to the disposition of a case."). But the

unusual circumstances here and the need to make a comprehensive record for appeal call for a different approach, so the Court will proceed. For the reasons that follow, the Court concludes that the evidence in the existing record does not support Plaintiffs' claim.

A. Applicable Legal Principles

To prevail on their equal protection claim, Plaintiffs must prove both that Secretary Ross's decision was "motivated by discriminatory animus" and that "its application results in a discriminatory effect." *Hayden v. Cty. of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999) ("*Hayden I*").[79]

In this context, discriminatory animus—or "[d]iscriminatory purpose"—"implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). At the same time, "a plaintiff need not prove that the 'challenged action rested solely on racially discriminatory purposes.'" *Hayden*

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[79] Although the Fourteenth Amendment's Equal Protection Clause applies only to the states, the "equal protection component" of the Fifth Amendment's Due Process Clause applies to the federal government. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214-17 (1995). And the equal protection analysis required by the two Clauses is the same. *See id.*; *see also, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment."). Accordingly, the Court refers to the Fifth Amendment analysis as an "equal protection" analysis, and relies on cases applying the Fourteenth Amendment's equal protection guarantee.

v. Paterson, 594 F.3d 150, 163 (2d Cir. 2010) ("*Hayden II*") (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)). Indeed, "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265. Thus, it is enough to show that an "invidious discriminatory purpose was *a* motivating factor" in the challenged decision. *Id.* at 266 (emphasis added).

In *Arlington Heights*, the Supreme Court observed that, "[b]ecause discriminatory intent is rarely susceptible to direct proof, litigants may make 'a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" *Hayden II*, 594 F.3d at 163 (quoting *Arlington Heights*, 429 U.S. at 266); *see Feeney*, 442 U.S. at 283 ("[S]ince reliable evidence of subjective intentions is seldom obtainable, resort to inference based on objective factors is generally unavoidable."). More specifically, the Supreme Court identified a set of non-exhaustive factors to guide courts in undertaking this "sensitive inquiry." First, whether the impact of the action "'bears more heavily on one race than another' may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Unless a "clear pattern, unexplainable on grounds other than race, emerges," however, "impact alone is not determinative, and the Court must look to other evidence." *Id.* (footnotes omitted). The "other evidence" can include the following:

> (1) "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (2) "[t]he specific sequence of events leading up the challenged decision"; (3) "[d]epartures from the normal procedural sequence"; (4) "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and (5) "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."

New York, 315 F. Supp. 3d at 807-08 (quoting *Arlington Heights*, 429 U.S. at 266-68). Finally, "'[i]n some extraordinary instances,' evidence of discriminatory animus may also come from the testimony of decisionmakers." *Id.* at 808 (quoting *Arlington Heights*, 429 U.S. at 268).

Defendants acknowledge that the foregoing standards define the relevant inquiry, yet in the very same breath they cite the Supreme Court's recent decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), for the proposition "that facially neutral policies are subject to only limited, deferential review and may not lightly be held unconstitutional." Defs.' Post-Trial Br. 82, ¶ 72. But, as the Court already explained, *see New York*, 315 F. Supp. 3d at 810, *Trump v. Hawaii* involved review of a presidential order that "prevent[s] the entry of [certain] *foreign nationals*" to the United States, 138 S. Ct. at 2405 (quoting Presidential Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017)) (emphasis added). It held that judicial "inquiry into *matters of entry and national security* is highly constrained" because "[a]ny

rule of constitutional law that would inhibit the flexibility of the President to respond to changing world conditions should be adopted only with the greatest caution." *Id.* at 2439-40 (emphasis added). That is, the Court held only that, in *that* context, a facially neutral policy survives judicial scrutiny if "it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Id.* at 2420. Nothing in the opinion indicates that this "circumscribed inquiry" applies outside of the "national security and foreign affairs context." *Id.* at 2420 n.5.

Indeed, applying *Trump v. Hawaii*'s deferential review in this setting would do more than unsettle decades of equal protection jurisprudence; it would decimate that jurisprudence altogether. It is one thing to uphold an Executive Branch decision that could "reasonably be understood to result from a justification independent of" an unconstitutional purpose in a context where the President exercises nearly "plenary" power. *See Kleindienst v. Mandel*, 408 U.S. 753, 769 (1972). It is another thing entirely to suggest that that a deferential standard should apply, as Defendants suggest, to *all* "facially neutral" government action. *See* Defs.' Post-Trial Br. 82, ¶ 72. Under that approach, even ordinary government action motivated "in part" by an unconstitutional discriminatory purpose would survive judicial scrutiny so long as a court could divine some *other* purpose that may have contributed to the action. That is emphatically not the law. *See, e.g.*, *Feeney*, 442 U.S. at 279 (noting that equal protection prohibits government action that is motivated even "in part" by discrimination); *Arlington Heights*, 429 U.S. at 265 (noting that a plaintiff need not prove that the "challenged action rested solely on racially discriminatory

purposes" to succeed in bringing an equal protection claim); *United States v. City of Yonkers*, 96 F.3d 600, 611 (2d Cir. 1996) (stating that a plaintiff "need not show . . . that a government decisionmaker was motivated solely, primarily, or even predominantly by concerns that were racial"). Instead, as Defendants themselves recognize when arguing that the Court should ignore statements by people other than Secretary Ross, "[t]his Court is bound to examine the decisionmaker's purposes." Defs.' Post-Trial Br. 83, ¶ 77 (internal quotation marks and emphasis omitted). That is precisely what this Court must—and therefore will—do.

B. The Scope of Review

Before turning to that inquiry, however, the Court pauses once again to address the proper scope of its review. As discussed above, Defendants have repeatedly contested the Court's authority to order discovery and consider evidence "beyond" the Administrative Record.

Although that dispute has largely centered on Plaintiffs' APA claims, Defendants previously maintained that the Court should limit its review to material in the Administrative Record when evaluating Plaintiffs' equal protection claim as well, on the ground that the APA provides a cause of action for agency action taken in violation of the Constitution. *See* Docket No. 333, at 3-4. It is not clear that Defendants still adhere to that view, as they suggest in their post-trial briefing only that the evidence in the Administrative Record does not support Plaintiffs' claim (and do so only briefly). *See* Defs.' Post-Trial Br. 83, ¶¶ 78-79. Nevertheless, because the issue has been so central to this litigation, the Court addresses it briefly here.

The Constitution forbids *all* purposeful official discrimination against protected groups, including discrimination that officials try to hide. That approach ensures that the prohibition does not become just a "test" of whether the officials taking discriminatory action have "stupid staff" who let their true purposes into the open. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1025 n.12 (1992) (Scalia, J.). Instead, the doctrine charges courts to "smoke out" unconstitutional governmental purposes that may be more hidden. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (noting that the "strict scrutiny" test is designed to "'smoke out' illegitimate uses of race"). That often requires courts to evaluate whether the government selected means that are "narrowly tailored" to achieving its goal, an inquiry that necessarily requires courts to evaluate what the government could have done, but did not. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 339-40 (2003) (holding that the Equal Protection Clause requires the government to engage in "serious, good faith consideration of workable . . . alternatives"); *J.A. Croson Co.*, 488 U.S. at 507 (faulting the government for the lack of "any consideration of the use of race-neutral means" to achieve its objectives); *see also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (opinion of Powell, J.) (noting that the "narrow tailored" test may "require consideration of whether lawful alternative and less restrictive means could have been used"). In short, the very doctrine contemplates a wide-ranging and penetrating inquiry capable of uncovering hidden forms of discrimination.

It follows that the Court should be able to consider evidence outside the Administrative Record designated by the agency and submitted to the Court when evalu-

ating Plaintiffs' equal protection claim. Indeed, it would be nearly impossible to "smoke out" discriminatory purpose if "litigants and courts evaluating whether government actors have engaged in invidious discrimination cannot look beyond the record that those very decisionmakers may have carefully curated to exclude evidence of their true 'intent' and 'purpose.'" *New York*, 2018 WL 5791968, at *5. Moreover, such a limited inquiry would prevent the Court from conducting the more expansive and searching inquiry into "circumstantial and direct evidence of intent" that *Arlington Heights* requires. *See Arlington Heights*, 429 U.S. at 266.[80] The cases that Defendants cite do not hold otherwise. *See* Docket No. 333, at 3-4. Most of those cases did not involve claims about a suspect class or prohibited animus and thus have little relevance to claims such as the one at issue here. *See Harkness v. Sec'y of Navy*, 858 F.3d

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[80] Notably, that is true even if Defendants are correct and the equal protection claim should be viewed as a species of APA claim subject to the "record rule" exceptions discussed above. The scope of the "whole record" for purposes of the APA must be defined in relation to whatever the substantive law makes relevant. Thus, for example, when evaluating a classic APA claim that an agency has acted unreasonably *in light of the record before the agency*, courts naturally limit their review to only those facts that were before the agency at the time of decision. For purposes of Plaintiffs' equal protection claim, the substantive law provides that Secretary Ross's motive or purpose are relevant—indeed, central—and Plaintiffs amply rebutted any presumption that the Administrative Record compiled by Defendants and submitted to the Court contained all available evidence regarding his motive or purpose. Accordingly, whether it is viewed as "completing" the record, "supplementing" the record, or going beyond the record (based on evidence of bad faith), the Court's review is not limited to the Administrative Record.

437, 442-44 (6th Cir. 2017) (non-APA Establishment Clause claims with no allegation of improper governmental motives or discriminatory animus); *Nazareth Hosp. v. Sec'y U.S. Dep't of Health & Human Servs.*, 747 F.3d 172 (3d Cir. 2014) (in challenge to agency action, no claim of discriminatory animus); *Ursack, Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 958-59 (9th Cir. 2011) (same); *Chang v. USCIS*, 254 F. Supp. 3d 160, 162 (D.D.C. 2017) (in equal protection claim, "[n]o suspect class [wa]s alleged"); *Harvard Pilgrim Health Care of New England v. Thompson*, 318 F. Supp. 2d 1, 9-11 (D.R.I. 2004) (in procedural due process challenge to agency adjudication, no claim about a suspect class or hidden animus). And the few cited decisions involving allegations of "illicit animus" acknowledge that discovery outside of the administrative record may be appropriate for such claims. *See Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Service*, 58 F. Supp. 3d 1191, 1238-41 (D.N.M. 2014) (noting that, although allowing extra-record discovery could "incentivize every unsuccessful party to agency action to allege . . . constitutional violations to trade in the APA's restrictive procedures for the more even-handed ones of the Federal Rules of Civil Procedure," extra-record discovery could still be appropriate where plaintiffs make a "compelling factual showing" of the need for an expansion of the record); *Evans v. Salazar*, No. C08-0372 (JCC), 2010 WL 11565108, at *1 (W.D. Wash. July 7, 2010) (denying a request for extra-record discovery, but acknowledging that, in principle, "discovery [was] appropriate for Plaintiffs' constitutional claims" (internal quotation marks omitted)). In short, there is no basis in law or logic to restrict judicial review of the due process claim to Defendants'

handpicked evidence. The Court therefore must decide whether Plaintiffs proved, on the full trial record, that Secretary Ross's decision was motivated by animus.[81]

C. Discussion

At the motion-to-dismiss stage, the Court found that Plaintiffs had plausibly alleged that Secretary Ross's decision was motivated by discriminatory animus. *See New York*, 315 F. Supp. 3d at 808-10. In making that finding, the Court relied on several of the NGO Plaintiffs' factual allegations, construed in a manner most favorable to them. *See id.* at 811. The Court cited, among other things, "departures from the normal procedural sequence," such as failing to test the citizenship question and ignoring the Census Bureau advisory committee's recommendations, *id.* at 808 (alterations and internal quotation marks omitted); oddities in the "specific sequence of events leading up to the chal-

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[81] The Court notes that the question of whether a particular official such as Secretary Ross may be compelled to give testimony relevant to such a claim implicates separate concerns about the burdens on high-ranking official's time. *See New York*, 2018 WL 4539659, at *1 ("High-ranking government officials . . . are generally shielded from depositions because they have greater duties and time constraints than other witnesses. If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation." (internal quotation marks omitted)). Such concerns might warrant precluding an otherwise relevant deposition, as in any civil case, but not because a court could not consider the deposition if it existed and were relevant to a party's substantive claims. *Cf. New York*, 2018 WL 5791968, at *5 n.9 (noting that the relevance of extra-record discovery does not automatically open the doors to such discovery, which still must be tailored to avoid undue burdens, including "intrusion on the governmental decisionmaking process").

lenged decision," such as Secretary Ross's shifting and inconsistent explanations of his motivation for reinstating the citizenship question; and the seemingly transparent pretext of the VRA-enforcement rationale, *id.* at 809 (internal quotation marks omitted). The Court cautioned, though, that without the benefit of inferences in their favor, such allegations might not be enough. Even if they established pretext, the Court explained, they "did not necessarily" establish "pretext for *discrimination*." *Id.* (emphasis added). The Court also considered the NGO Plaintiffs' allegations of statements made by President Trump around the time of Secretary Ross's decision that, "while not pertaining directly to that decision, could be construed to reveal a general animus toward immigrants of color." *Id.* at 810. The Court noted, however, that the President's statements were probative only if he was personally involved in Secretary Ross's decision. *See id.* The Court found a basis to infer that President Trump was directly involved: Plaintiffs' allegation that his reelection campaign had sent an email announcing that he had "'officially mandated'" Secretary Ross's decision. *Id.* All together, the Court held that "drawing all reasonable inferences in Plaintiffs' favor," these allegations, combined with the President's statements, "nudge[d] [the] NGO Plaintiffs' claim of intentional discrimination across the line from conceivable to plausible." *Id.*

In many respects, the trial evidence was consistent with Plaintiffs' original allegations. As discussed at length above, it included ample evidence of procedural irregularities and substantive departures. That evidence, taken together, supports a finding that Secretary Ross's stated rationale was pretextual. But, for purposes of their equal protection claim, Plaintiffs must

prove more than that. Specifically, they must prove what the rationale was a pretext for—and, more to the point, that it was a pretext *for discrimination* prohibited by the Due Process Clause. *See St. Mary's Honor Ctr.*, 509 U.S. at 515 (stating, in the Title VII context, that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason"); *Vega v. Hempstead Union Free Sch. Dist.*, 801 F.3d 72, 83, 88 (2d Cir. 2015) (noting that, for purposes of defining discrimination and pretext, an "equal protection claim parallels [a] Title VII claim"); *Patterson v. Cty. of Oneida, N.Y.*, 375 F.3d 206, 225-27 (2d Cir. 2004) ("Most of the core substantive standards that apply to claims of discriminatory conduct in violation of Title VII are also applicable to claims of discrimination . . . in violation of . . . the Equal Protection Clause."); *see also, e.g., Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 125 n.16 (2d Cir. 2004) (distinguishing between pretext that is "connected to an offensive stereotype" and thus "considerably more probative of discrimination than a pretextual answer that is unconnected to such a stereotype" (internal quotation marks omitted)). Plaintiffs have not carried that burden.

The extra-record discovery does not, as Plaintiffs' all but admit, reveal discriminatory animus on the part of Secretary Ross himself. *See, e.g.*, Pls.' Proposed Findings ¶ 292 ("None of the emails in which the Secretary expressed deepening concern that Commerce might not be able to add the question explained *why* he

cared so much about adding the question.").[82] Instead, Plaintiffs point primarily to the motivations of "those who influenced" Secretary Ross in the decision-making process, including Kobach, Bannon, and Attorney General Sessions. Pls.' Proposed Conclusions ¶¶ 538, 541-42. But whether or not the trial evidence would support a finding that those advisors acted with a discriminatory purpose, the trial evidence does not establish that they communicated such a purpose to Secretary Ross, as would be necessary to impute their discriminatory purpose to him. Similarly, Plaintiffs failed to prove a sufficient nexus between President Trump and Secretary Ross's decision to make the President's statements or policies relevant to the equal protection analysis. In particular, Plaintiffs failed to back up the primary allegation in their pleadings that had supported finding such a nexus: the email from President Trump's reelection campaign announcing that he "officially mandated" the decision. The Court sustained Defendants objection to admission of the email on the ground that it was hearsay, *see* Docket No. 539-1, at 35; *New York*, 315 F. Supp. 3d at 810; Tr. 1315, 1565-66, and Plaintiffs offered no other evidence

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[82] Plaintiffs cite only one statement of Secretary Ross himself in support of their contention that he was "motivated at least in part by a desire to dilute the political power of immigrant communities of color": an October 9, 2017 statement in which he endorsed "a wide array of President Trump's immigration policies," including a proposal "to restrict what [the President] called 'chain migration,' . . . a program that primarily benefits immigrants of color." Pls.' Proposed Conclusions ¶¶ 538-39; *see also* Pls.' Proposed Findings ¶¶ 450, 938. By itself, however, that statement does not come close to establishing a constitutionally prohibited discriminatory purpose. Nor did the statement have anything to do with the census or the challenged decision.

of a nexus between the President and Secretary Ross's decision, *see* Tr. 1566-68.

In short, the Court finds that Plaintiffs failed to prove, by a preponderance of the evidence, that a discriminatory purpose motivated Defendants' decision to reinstate the citizenship question on the 2020 census questionnaire.[83] To be fair, it is possible that Plaintiffs could have carried their burden on that score had they had access to sworn testimony from Secretary Ross himself. As Defendants concede, Secretary Ross's intent—as the official decision-maker—was crucial to the equal protection claim. *See* Tr. 1575. Secretary Ross's testimony could have revealed the nature of his conversations with Kobach, Bannon, and Attorney General Sessions, and whether President Trump directed the addition of the citizenship question. But Plaintiffs were denied the opportunity to depose Secretary Ross because the Supreme Court stayed this Court's Order authorizing such a deposition pending its resolution of Defendants' petition for a writ of certiorari. *See In re Dep't of Commerce*, 139 S. Ct. at 17. In light of the urgency of these proceedings, Plaintiffs

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[83] Plaintiffs' primary argument was that Secretary Ross's decision violated the Due Process Clause because it was motivated by animus against immigrants of color, but in closing they argued in the alternative that it was unlawful because it was motivated by animus against noncitizens generally. *See* Tr. 1428-29, 1568-69. The Court need not decide whether proof of intentional discrimination against immigrants or noncitizens as a group would make out an equal protection violation because, on the existing record, the Court would reach the same conclusion even if it would. Put simply, Plaintiffs did not prove by a preponderance of evidence that the decision was motivated by animus, against immigrants of color or immigrants generally.

decided to press ahead to trial rather than waiting to see if the Supreme Court eventually lifts the stay. *See* Docket No. 399, at 2; *see also* Tr. 1576. That decision was understandable, but means that the equal protection claim rises or falls on a record without Secretary Ross's deposition. For the reasons the Court has explained, that record fails to support Plaintiffs' equal protection claim.

REMEDIES

Given the Court's conclusion that Secretary Ross's decision violated the APA, the Court is required by the plain terms of the statute to "hold [the decision] unlawful" and to "set [it] aside." 5 U.S.C. § 706(2). Nevertheless, the parties vigorously dispute precisely what that should mean in the context of these cases. *Compare* Pls.' Proposed Conclusions ¶¶ 449-86, *with* Defs.' Post-Trial Br. 83-87, ¶¶ 80-97. Accordingly, the Court turns to the question of remedies.

A. General Legal Principles

Plaintiffs brought this challenge under the APA, which provides a "generic cause of action," *Koretoff v. Vilsack*, 614 F.3d 532, 536 (D.C. Cir. 2010), for any "person suffering legal wrong because of agency action," 5 U.S.C. §§ 702, 704. Significantly, the APA also prescribes a remedy: "[T]he reviewing court *shall* . . . hold unlawful *and set aside* agency action" found to violate its terms. 5 U.S.C. § 706(2) (emphases added). By the statute's plain terms, therefore, the "normal remedy" in a successful APA challenge is to set aside—that is, vacate—the final agency action at issue. *See, e.g.*, *Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014); *see also, e.g.*, *Federal Election*

Comm'n v. Akins, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case. . . . "); *Camp*, 411 U.S. at 143 (stating that, if agency action is not "sustainable on the administrative record made," it "must be vacated"); *Guertin v. United States*, 743 F.3d 382, 388 (2d Cir. 2014) ("In the usual case, when an agency violates its obligations under the APA, we will vacate a judgment and remand to the agency. . . . ").[84] Moreover, because the statutory remedy is directed at the *entire* "final agency action" that the APA subjects to judicial review, the "normal remedy" is to set aside the agency action wholesale, not merely as it applies to the particular plaintiff or plaintiffs who brought the agency action before the court. *See, e.g.*, *Harmon v. Thornburgh*, 878 F.2d 484, 495 n.21 (D.C. Cir. 1989) ("When a reviewing court determines that agency [action] [is] unlawful, the ordinary result is that the [action is] vacated—not that [its]

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[84] Ordinarily, vacatur is accompanied by a remand to the agency. *See Akins*, 524 U.S. at 25; *accord Guertin*, 743 F.3d at 388; *see also Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Thus, the default remedy for most APA violations is to vacate *and* remand. *See Akins*, 524 U.S. at 25; *Camp*, 411 U.S. at 143. Nevertheless, consistent with principles of equity, the Second Circuit has held that "there are occasions in which remand to the agency for further review is not appropriate." *Guertin*, 743 F.3d at 388; *accord Ithaca Coll. v. NLRB*, 623 F.2d 224, 229 (2d Cir. 1980) ("Although we are empowered, we are not required to remand."). Vacatur-without-remand may be appropriate, for example, where "compelling evidence in the record" conclusively establishes a plaintiff's right to relief and the "record . . . would not change" on remand, *Guertin*, 743 F.3d at 388-89, or where the agency "had the opportunity to address [an] issue . . . [and] improperly and arbitrarily refused" to do so, *Ithaca Coll.*, 623 F.2d at 229-30.

application to the individual [plaintiffs] is proscribed."); *accord NAACP v. Trump*, 315 F. Supp. 3d 457, 474 n.13 (D.D.C. 2018).

That said, APA review of agency action is "vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939). Thus, some courts have held that equitable principles can justify a departure from the remedy seemingly mandated by the APA's text. For example, courts—especially in the D.C. Circuit—have occasionally ordered remand *without* vacatur. *See, e.g.*, *NRDC v. U.S. EPA*, 808 F.3d 556, 584 (2d Cir. 2015); *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Given the plain language of the statute, there is an understandable and substantial debate about whether such a remedy is in fact "within the bounds of the statute," *Ford Motor Co.*, 305 U.S. at 373; *compare Milk Train, Inc. v. Veneman*, 310 F.3d 747, 757-58 (D.C. Cir. 2002) (Sentelle, J., dissenting) (arguing that remand-without-vacatur violates the APA's clear text mandating that the court "shall" set aside unlawful agency action), *and Checkosky v. SEC*, 23 F.3d 452, 490-91 (D.C. Cir. 1994) (opinion of Randolph, J.) (same), *with id.* at 462-65 (opinion of Silberman, J.) (defending the remedy); *see also, e.g.*, *EME Homer City Generation, L.P. v. EPA*, 795 F.3d 118, 132 (D.C. Cir. 2015) (Kavanaugh, J.) ("[R]emand without vacatur creates a risk that an agency may drag its feet and keep in place an unlawful agency rule."). Be that as it may, courts have held that remand with-

out vacatur may be appropriate "when an agency may be able readily to cure a defect in its explanation of a decision and the disruptive effect of vacatur is high" or when vacatur "would at least temporarily defeat" the purpose of the party seeking relief. *NACS v. Bd. of Governors of Fed. Reserve Sys.*, 746 F.3d 474, 493 (D.C. Cir. 2014) (internal quotation marks omitted); *see also, e.g.*, *EME Homer City Generation*, 795 F.3d at 132; *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

Finally, to the extent relevant here, courts often enjoin future action by government officials where the principles of equity support such relief. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243 (2006) (affirming an injunction against the Attorney General in an APA action); *Franklin*, 505 U.S. at 802 ("[I]njunctive relief against executive officials like the Secretary of Commerce is within the courts' power. . . . "). Whether such additional relief is warranted turns on the traditional four factors, namely whether the plaintiff proves "(1) that it [will suffer] an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (internal quotation marks omitted). But because the government is a party, and "the government's interest *is* the public interest," the last two factors merge. *Pursuing Am. Greatness v. FEC*, 831 F.3d 500, 511 (D.C. Cir. 2016); *accord Nken v. Holder*, 556 U.S. 418, 435 (2009).

B. Discussion

1. Vacatur and Remand

Applying the foregoing standards here, the Court concludes that there is no reason to depart from the "usual" remedy for violations of the APA: vacatur and remand. *Guertin*, 743 F.3d at 388. Vacatur is consistent with both the plain language of the APA and the principle that agency action taken in violation of the APA "cannot be afforded the force and effect of law." *Chrysler Corp. v. Brown*, 441 U.S. 281, 313 (1979) (internal quotation marks omitted).

Moreover, it has long been held to be the appropriate remedy when, as here, an agency acts contrary to law, *see, e.g.*, *NRDC v. EPA*, 489 F.3d 1250, 1261 (D.C. Cir. 2007), or agency action is found to be arbitrary and capricious, *see, e.g.*, *Camp*, 411 U.S. at 143. Remand, meanwhile, is appropriate as well, in recognition of the fact that Congress delegated its authority over administration of the census to the Secretary of Commerce, not to this Court. That is not to say that Defendants can or would be able to remedy the defects in Secretary Ross's decision that this Court has found in time for the 2020 census. But to the extent that a "remand" is even necessary to make clear that the Secretary of Commerce retains authority to make decisions about the census, so long as they are consistent with law and this Court's Opinion, a remand is appropriate.

The parties' respective arguments for an alternative remedy are unpersuasive. For their part, Defendants contend that remand *without* vacatur is "the only potentially appropriate remedy." Defs.' Post-Trial Br. 83-85, ¶¶ 80-85. Putting aside whether such a remedy

is consistent with the plain language of the APA, it is inappropriate here. Courts authorizing remand without vacatur have done so where the agency shows "at least a serious possibility that [it] will be able to substantiate its decision on remand" and that "the consequences of vacating may be quite disruptive." *Allied-Signal, Inc.*, 988 F.2d at 151. Defendants have done neither here. The problem with Secretary Ross's decision was not that it was inadequately explained, but rather that it was substantively arbitrary and capricious and "not in accordance" with statutes that constrain his discretion. And as Plaintiffs correctly point out, "the Secretary has never suggested an alternative basis for his decision." Pls.' Proposed Conclusions ¶ 456. Notably, Defendants offer nothing more than a bare conclusory assertion that "there is a non-trivial likelihood that the agency will be able to state a valid legal basis for its decision" on remand. Defs.' Post-Trial Br. 84, ¶ 83 (internal quotation marks and alterations omitted). Nothing in either the Administrative Record or the trial record even remotely suggests such a "likelihood."

Second, Defendants' assertions about "the disruptive consequences of vacating the rule [sic]" are overblown. Defs.' Post-Trial Br. 84-85, ¶ 84.[85] The Court has no doubt that Defendants are "diligently at work

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[85] The Court notes, in this regard, that the disruptions Defendants assert all involve Defendants' own internal processes. The Court is not so sure that additional burdens on governmental resources are the type of disruption with which the remand-without-vacatur remedy is concerned, at least insofar as those burdens do not seriously harm the public interest. More to the point, the Court fails to see how it would be equitable to leave unlawful governmental action standing simply because vacating it would involve more work for the very agency that violated the law in the first place.

preparing for the 2020 census, including working with its communication contractors and trusted partners concerning the reinstatement of a citizenship question." *Id.* But, unless this Court's decision is reversed by a higher court, vacating Secretary Ross's decision means only that the 2020 census questionnaire may not include a question about citizenship. *See* AR200-213 (listing the subjects planned for the 2020 census before Secretary Ross's decision). Significantly, it does not preclude Defendants from continuing to test the question or making whatever preparations they think appropriate in the event that the question is ultimately allowed to appear on the questionnaire. Moreover, the whole point of the parties' and the Court's haste in this litigation is that the census questionnaires have not yet been printed and that ordering any remedy *after* they are printed would result in significantly greater disruption and expense.

Defendants' final objection to the normal APA remedy of vacatur is that APA relief should *never* extend more broadly than the particular injuries proved by the plaintiffs in a given case. Defs.' Post-Trial Br. 85-87, ¶¶ 86-89, 95. Article III standing principles, in their view, constrain the courts' power to enforce the statutory remedy that Congress has created for violations of the APA. *Id.* But that argument is too clever by half. If Defendants are right that Article III constrains the Court's power to order relief beyond the parties who have demonstrated injury in a particular case, what kind of "remand" would ever be possible in an APA case? Do Defendants imagine that the Court should "remand" with respect to only certain Plaintiffs? Taken to its logical conclusion, Defendants' argument implies that the judicial review provision of the APA is

inconsistent with Article III. But no court, least of all the Supreme Court, has suggested as much. Article III limits the federal courts' power to actual "cases" or "controversies," which do not exist when there is no plaintiff who has a personal stake in the outcome of litigation. But once such a personal stake is present, the Court *does* have power to adjudicate the controversy, and the question of what relief it may or must order is a "merits" question of substantive law that is ultimately for the legislature to decide (so long, of course, as any such relief has "direct consequences on the parties involved"), *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (internal quotation marks omitted))—hence the normal rule that only one plaintiff need have standing in order to empower the court to decide a case. Here, Congress has required that agency action be reasonable and has prescribed that courts must set it aside where it is not—rather than, for example, awarding damages to compensate for the specific injuries suffered by plaintiffs as a result of unreasonable agency action. In short, assuming that a court has Article III jurisdiction—as this Court does—and that the APA's other statutory requirements are satisfied —as they are here—a court has both the power *and* the duty to order the remedy Congress created.

Plaintiffs, meanwhile, seek the opposite remedy: vacatur *without* remand. PCOL ¶¶ 453-57. On its face, that request has some merit, if only because Defendants have never suggested an alternative basis for adding a citizenship question to the census, and it is doubtful that Defendants could cure the problems identified above by June, when the census questionnaires have to be printed. *See, e.g., Crown Cork & Seal Co. v. NLRB*, 36 F.3d 1130, 1142-43 (D.C Cir. 1994) (hold-

ing that remand was unnecessary because the agency had "suggested no alternative bases for upholding" its determination); *Chem. Mfrs. Ass'n v. EPA*, 28 F.3d 1259, 1268 (D.C. Cir. 1994) (same). At the same time, however, it is not entirely clear what it would mean to refrain from remand in the circumstances of these cases. By analogy to appellate litigation, a remand is arguably necessary to restore an agency's "jurisdiction" where an adjudicatory decision or formal rulemaking was under review. Here, by contrast, Secretary Ross's "jurisdiction" over the 2020 census has presumably continued unabated throughout this litigation, and his ongoing obligation to execute his statutory duties with respect to the census will survive whatever remedy the Court orders. Put differently, it is hard to see how the Court's decision whether or not to "remand" in these cases could affect the Secretary's ongoing statutory authority over the form and content of the census questionnaire. Having said all that, and if only to avoid confusion, the Court will "remand" the case to the extent that such an order is necessary to restore the Secretary's jurisdiction over the census questionnaire. It goes without saying that such remand is limited to further action not inconsistent with the Court's Orders.

2. Injunctive Relief

Thus, there is no basis to deviate from the standard remedy of vacatur and remand in these cases. Whether the Court should also issue an injunction is a closer question. Certainly, the four traditional factors governing the inquiry into whether to grant injunctive relief are satisfied. As discussed (at great length) above, Plaintiffs proved at trial that, if the citizenship question

is added to the 2020 census questionnaire, they will suffer serious harm in the form of lost political representation, lost federal funding, and degradation of information that is an important tool of state sovereignty. And at least two of those injuries—the loss of political representation and the degradation of information—would be irreparable, without any adequate remedy at law. *Cf., e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (noting that a state's inability to implement its laws constitutes irreparable harm); *Department of Commerce*, 525 U.S. at 344 (holding that the prospective loss of representation in Congress warrants injunctive relief). As for the final two factors, "[t]here is generally no public interest in the perpetuation of unlawful agency action. To the contrary, there is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (internal quotation marks and citation omitted). Moreover, both the Supreme Court's decision in *Department of Commerce*—affirming the Eastern District of Virginia's permanent injunction against the use of statistical sampling to enumerate the population in the 2000 census—and the Second Circuit's holding in *Carey*—affirming the Southern District of New York's preliminary injunction requiring the Census Bureau to process certain forms and to compare its list of New York City residents against other government records—confirm that the public interest favors an injunction in these cases. *See Department of Commerce*, 525 U.S. at 344; *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980). ("[T]he public interest . . . requires obedience . . . to the requirement that Congress be fairly apportioned,

based on accurate census figures. Furthermore, it is in the public interest that the federal government distribute its funds, when the grant statute is keyed to population, on the basis of accurate census data.").

What makes the question a somewhat closer one is whether, in light of the vacatur of Secretary Ross's decision, an injunction is necessary. In *Monsanto*, the Supreme Court admonished that a district court vacating agency action under the APA should not grant an injunction if doing so would "not have any meaningful practical effect independent of its vacatur." *Monsanto Co.*, 561 U.S. at 165. "An injunction," the Court reasoned, "is a drastic and extraordinary remedy, which should not be granted as a matter of course." *Id.* at 165-66. Thus, "[i]f a less drastic remedy (such as . . . vacatur . . .)" is "sufficient to redress" Plaintiffs' injuries, "no recourse to the additional and extraordinary relief of an injunction" would be "warranted." *Id.* Here, vacatur of Secretary Ross's decision undoubtedly goes a long way toward redressing Plaintiffs' injuries. Nevertheless, the Court concludes that granting an injunction would have two practical effects beyond mere vacatur of Secretary Ross's March 26, 2018 memorandum. First, in the absence of an injunction, Secretary Ross could theoretically reinstate his decision by simply re-issuing his memorandum under a new date or by changing the memorandum in some immaterial way. Secretary Ross retains the same statutory authority over the census that he had before the Court's decision today, provided (as always) that he exercises it consistent with the APA and applicable law (and the Court's order). *See New York*, 315 F. Supp. 3d at 804-06. In the circumstances of these cases, however, an injunction is necessary to make the Court's vacatur effective, as it

prevents Secretary Ross from arriving at the same decision *without* curing the problems identified in this Opinion. Second, and related, an injunction will make it easier for Plaintiffs to seek immediate recourse from this Court in the event that Defendants seek to do anything inconsistent with this Opinion. The ability to seek immediate recourse is critical in these cases given the looming printing deadline.

Thus, in an exercise of its discretion, the Court does grant an injunction. In particular, the Court enjoins Defendants from adding a citizenship question to the 2020 census questionnaire based on Secretary Ross's March 26, 2018 memorandum or based on any reasoning that is substantially similar to the reasoning contained in that memorandum. More specifically, Defendants are enjoined from adding a citizenship question to the 2020 census questionnaire unless the Secretary: exhausts the maximum possible usefulness of administrative records to acquire adequate information "consistent with the kind, timeliness, quality and scope of the statistics *required*," 13 U.S.C. § 6(c) (emphasis added); submits a report to the relevant congressional committees "containing [his] determination of the . . . questions as proposed to be modified," 13 U.S.C. § 141(f)(3); considers all relevant evidence and aspects of the problem; and provides, in support of the decision, his real rationale. To be clear, the Court does *not* enjoin Defendants from continuing to study whether and how to collect data on citizenship as part of the census (or any other Census Bureau instrument). Nor does the Court enjoin Defendants from conducting tests with respect to the addition of a citizenship question or otherwise taking appropriate steps to prepare for the 2020 census—recognizing that, if a higher court disagrees with

this Court's ruling, the citizenship question may well end up on the questionnaire and that Defendants should not be precluded from preparing accordingly.[86]

One final note about the scope of the Court's injunction. Defendants argue that any injunctive relief in these cases should not "extend beyond the Plaintiffs to this litigation." Defs.' Post-Trial Br. 85, ¶ 86.[87] More broadly, they try to fit these cases into the larger current debate over so-called "nationwide"—really, universal—injunctions. *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2425-29 (2018) (Thomas, J., concurring); Memorandum from the Attorney General, *Litigation Guidelines for Cases Presenting the Possibility of Nationwide Injunctions* (Sept. 13, 2018), https://www.justice.gov/opa/press-release/file/1093881/download.

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[86] For the same reasons, the Court's injunction does not preclude OMB from reviewing or acting on Defendants' submission pursuant to the Paperwork Reduction Act.

[87] Somewhat surprisingly, Defendants expand this argument to cover the remedy of vacatur, arguing that "the APA's text does not permit, let alone[] require, universal *vacatur*." Defs.' Post-Trial Br. 87, ¶ 95 (emphasis added). That would come as a surprise to the Supreme Court, which routinely vacates or stays agency action "universally," without regard to any such limitation in the APA. *See, e.g., West Virginia v. EPA*, 136 S. Ct. 1000 (2016) (mem.) (staying an EPA rule pending APA review in the D.C. Circuit); *Judulang v. Holder*, 565 U.S. 42, 64 (2011) (rejecting as arbitrary and capricious a Board of Immigration Appeals policy regarding discretionary relief from removal); *Gonzales*, 546 U.S. at 274-75 (affirming a lower-court injunction of a directive by the Attorney General that exceeded his statutory authority under the Controlled Substances Act); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 486 (2001) (affirming in part the D.C. Circuit's vacatur of EPA air pollution standards). In any event, the Court rejects this notion for the reasons explained above.

But it is an odd fit indeed. Because the Secretary's *decision* was universal, APA relief directed at that decision may—indeed, arguably must—be too. *See* 5 U.S.C. § 706(2); *cf., e.g., Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class."). That is, these cases do not involve the case-by-case enforcement of a particular policy or statute. Instead, it concerns a single decision about a single questionnaire, to be used on a single census throughout the nation. Were the Court to hold that its injunction should apply only to Plaintiffs (whatever that would even mean given that Plaintiffs include NGOs with members in all fifty states and the District of Columbia, *see* Recitation of Facts ¶ 257), the Court would be "drawing a line which the agency itself has never drawn." *Harmon*, 878 F.2d at 495. In fact, Defendants have never suggested—let alone presented any evidence to support—that a citizenship question could somehow be included only in some census questionnaires, but not in others. *Cf. Texas v. United States*, 809 F.3d at 187-88 (upholding a "nationwide" injunction against the federal government's DAPA policy because the Constitution and federal law contemplate, if not require, "uniform" immigration rules and because an injunction limited to one or more of the plaintiff states was likely to be "ineffective"). And indeed, the Supreme Court's own past practice supports census-wide relief. *See Department of Commerce*, 525 U.S. at 344 (affirming the Eastern District of Virginia's universal injunction against the use of statistical sampling for apportionment purposes on the 2000 census); *see also Glavin v. Clinton*, 19 F. Supp. 2d 543, 553 (E.D. Va. 1998) (three-judge

court) (entering the universal injunction affirmed in *Department of Commerce*).

Moreover, granting nationwide relief does not meaningfully intrude on the discretion delegated to the Secretary of Commerce over the census. Exercising that discretion by electing to use two forms of the census questionnaire—one without the citizenship question (in areas subject to a ruling by the Court) and one with the citizenship question (in other areas)—would almost certainly run afoul of the Census Act, if not provisions of the Constitution itself, *see* U.S. Const. art. I, § 2, cl. 3 (requiring an "actual Enumeration" for purposes of apportionment); *id.* amend. XIV, § 2, cl. 1 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . . "); *see also Shelby County v. Holder*, 570 U.S. 529, 544 (2013) (noting the "fundamental principle of equal sovereignty among the States") (internal quotation marks and emphasis omitted). And it would result in the very harms that this Court's decision is intended to redress—by causing net differential undercounts in *non*-plaintiff states, thereby potentially giving the Plaintiff States representational or funding windfalls. But equitable relief "issues to remedy a wrong, not to promote one." *Morrison v. Work*, 266 U.S. 481, 490 (1925) (Brandeis, J.). Granted, in the unlikely event that Secretary Ross proceeded with two different census questionnaires, those harmed could bring their own lawsuit. But it is near certain that the press of time would preclude "orderly judicial review of any disputed matters that might arise." *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam). Thus, an injunction barring Defendants

from including a citizenship question on the 2020 census questionnaire altogether is appropriate.

3. Declaratory Relief

Finally, the Court denies Plaintiffs' request for declaratory relief as unecessary. *See* Pls.' Proposed Conclusions ¶ 615; SAC 57; NGO Compl. 67. The Declaratory Judgment Act vests federal courts with discretion, in a proper case, to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *see Wilton v. Seven Falls Co.*, 515 U.S. 277, 282 (1995). In exercising that discretion, courts must consider "(1) whether the judgment will serve a useful purpose in clarifying or settling the legal issues involved; . . . (2) whether a judgment would finalize the controversy and offer relief from uncertainty[;] . . . [3] whether the proposed remedy is being used merely for procedural fencing or a race to res judicata; [4] whether the use of a declaratory judgment would increase friction between sovereign legal systems or improperly encroach on the domain of a state or foreign court; and [5] whether there is a better or more effective remedy." *Dow Jones & Co. v. Harrods Ltd.*, 346 F.3d 357, 359-60 (2d Cir. 2003) (citations and internal quotation marks omitted). Applying those standards here, the Court concludes that a declaratory judgment would serve little "useful purpose" beyond what has already been said and ordered here. More to the point, there is a "better" remedy available to Plaintiffs in these cases—and they now have it. The relief awarded, combined with the preclusive effect (at least as between these parties) of the Court's factual findings and legal conclusions, is as

good and as "effective"—and, for that matter, as "declaratory"—a remedy as Plaintiffs require.

CONCLUSION

There is no dispute that the Constitution, the Census Act, and the APA allow the Secretary of Commerce broad discretion over the design and administration of the decennial census. *See Wisconsin*, 517 U.S. at 18-20. Generally speaking, they do not preclude the Secretary from charting a new policy direction, even over the strenuous objections of career staff, or from recruiting other government officials to support such a change. Significantly, however, the discretion that they allow the Secretary is not unlimited. He must comply with the policy decisions that Congress—to which the Constitution gives authority over the census—has made and enshrined in statute, including but not limited to the preference for obtaining data through administrative records rather than through direct inquiries. He must follow the procedures mandated by law. And more broadly, the exercise of his statutory authority must "be reasonable and reasonably explained." *Mfrs. Ry. Co.*, 676 F.3d at 1096.

Measured against these standards, Secretary Ross's decision to add a citizenship question to the 2020 census—even if it did not violate the Constitution itself—was unlawful for a multitude of independent reasons and must be set aside. To conclude otherwise and let Secretary Ross's decision stand would undermine the proposition—central to the rule of law—that ours is a "government of laws, and not of men." John Adams, *Novanglus Papers*, No. 7 (1775). And it would do so with respect to what Congress itself has described as "one of the most critical constitutional functions our

Federal Government performs." 1998 Appropriations Act, § 209(a)(5), 111 Stat. at 2480-81.

Accordingly, and for the reasons stated at length above, the Court vacates Secretary Ross's decision to add a citizenship question to the 2020 census questionnaire, enjoins Defendants from implementing Secretary Ross's March, 26, 2018 decision or from adding a question to the 2020 census questionnaire without curing the legal defects identified in this Opinion, and remands the matter to the Secretary of Commerce (to the extent that such a "remand" is even necessary) for further proceedings not inconsistent with the Court's Order.[88]

One final housekeeping matter remains. At the end of trial, the Court indicated (without objection) that it would reopen the record for the limited purpose of taking Secretary Ross's testimony should the Supreme Court lift its stay of this Court's Order authorizing his deposition before the Court issued a final decision. *See* Tr. 1406-07; Docket No. 538, at 2. With

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[88] In their Complaints, Plaintiffs ask for attorney's fees and other, similar relief. *See* NGO Compl. 67; SAC 58. The parties have not briefed those issues, and the Court does not address them here. Moreover, given the pending litigation in the Supreme Court, and the high likelihood of appeals from this Court's judgment, it would make sense to defer any such litigation until such appeals run their course. Accordingly, unless and until the Court orders otherwise, Plaintiffs shall file any application for attorney's fees within thirty days of the judgment in this case becoming final and not appealable.

this ruling, that possibility is now foreclosed. Accordingly, the Court's September 21, 2018 Order granting Plaintiffs' motion to compel the deposition of Secretary Ross, *see* Docket No. 345, is VACATED as moot.

SO ORDERED.

Dated: Jan. 15, 2019
New York, New York

/s/ JESSE M. FURMAN
JESSE M. FURMAN
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

18-CV-5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

[Filed: July 26, 2018]

OPINION AND ORDER

JESSE M. FURMAN, United States District Judge:

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INTRODUCTION

The Fourteenth Amendment to the Constitution provides that "Representatives shall be apportioned among the several States according to their respective Numbers, counting the whole number of persons in each State." U.S. CONST. amend. XIV, § 2. Article I of the Constitution provides, in turn, that the number of persons in each state is to be calculated by means of an "actual Enumeration"—known as the census—every ten years "in such Manner as [Congress] shall by Law direct." *Id.* art. I, § 2, cl. 3. Since 1790, the government has conducted that "actual Enumeration" through questions—initially asked in person and, later, by means of written questionnaire—about both the number and demographic backgrounds of those living in each American household. Beginning in 1820, one such question concerned (in one form or another) citizenship status. The government ceased asking that question of everyone nationwide in 1960. Earlier this year, however, Secretary of Commerce Wilbur L. Ross, Jr., exercising authority delegated by Congress over the census, announced that he was reinstating the citizenship question on the 2020 census questionnaire. Secretary Ross explained that reinstatement of the citizenship question is necessary for the Department of Justice to en-

force, and courts to adjudicate, violations of Section 2 of the Voting Rights Act of 1965, codified at 52 U.S.C. § 10301.

Plaintiffs in these two related cases (which have been informally consolidated for purposes of scheduling and discovery) contend that Secretary Ross's decision to reinstate the citizenship question on the 2020 census questionnaire violates both the Constitution and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* In 18-CV-2921, Plaintiffs are eighteen states and the District of Columbia, as well as various cities, counties, and mayors; they challenge the Secretary's decision under both Article I's Enumeration Clause and the APA. (Docket No. 214 ("SAC"), ¶¶ 178-97). In 18-CV-5025, Plaintiffs are five nongovernmental organizations, four suing on behalf of themselves and their members and one suing only on its own behalf; they challenge the Secretary's decision on the same grounds and also as a violation of equal protection, as embodied in the Due Process Clause of the Fifth Amendment. (18-CV-5025, Docket No. 1 ("NGO Compl."), ¶¶ 193-212).[1] On May 25, 2018, Defendants—the United States Department of Commerce; Secretary Ross (the "Secretary"); the Bureau of the Census (the "Census Bureau"); and Acting Director of the Census Bureau, Ron Jarmin—moved, pursuant to Rule 12(b)(1) and (b)(6) of the Federal Rules of Civil Procedure, to dismiss the First Amended Complaint in 18-CV-2921.

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[1] Unless otherwise noted, docket references are to 18-CV-2921. Additionally, "Plaintiffs" refers to the plaintiffs in both cases, "Government Plaintiffs" refers to the plaintiffs in 18-CV-2921, and "NGO Plaintiffs" refer to the plaintiffs in 18-CV-5025.

(Docket No. 154).[2] On June 29, 2018, Defendants moved to dismiss the Complaint in 18-CV-5025. (18-CV-5025, Docket No. 38). The Court held oral argument on the first motion on July 3, 2018. (*See* July 3, 2018 Transcript, Docket No. 207 ("Oral Arg. Tr.")).

Broadly speaking, in this Opinion, the Court reaches three conclusions with respect to Defendants' motions. *First*, the Court categorically rejects Defendants' efforts to insulate Secretary Ross's decision to reinstate the citizenship question on the 2020 census from judicial review. Contending that Plaintiffs cannot prove they have been or will be injured by the decision, and citing the degree of discretion afforded to Congress by the Enumeration Clause and to the Secretary by statute, Defendants insist that this Court lacks jurisdiction even to consider Plaintiffs' claims. As the Court will explain, however, that contention flies in the face of decades of precedent from the Supreme Court, the Second Circuit, and other courts. That precedent makes clear that, while deference is certainly owed to the Secretary's decisions, courts have a critical role to play in entertaining challenges like those raised by Plaintiffs here.

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[2] On July 23, 2018, Plaintiffs in 18-CV-2921 filed a Second Amended Complaint, which adds the City of Phoenix as a plaintiff and includes allegations relating to Phoenix, but "otherwise does not substantively alter" the First Amended Complaint that Defendants had originally moved to dismiss. (Docket No. 210-1; *see* Docket No. 214 (refiling the Second Amended Complaint due to a filing error)). By Order entered on July 24, 2018, the Court indicated that it would treat Defendants' previously filed motion to dismiss "as applying to the Second Amended Complaint." (Docket No. 213).

Second, the Court concludes that the citizenship question is a permissible—but by no means mandated—exercise of the broad power granted to Congress (and, in turn, to the Secretary) in the Enumeration Clause of the Constitution. That conclusion is compelled not only by the text of the Clause, which vests Congress with virtually unlimited discretion in conducting the census, but also by historical practice. The historical practice reveals that, since the very first census in 1790, the federal government has consistently used the decennial exercise not only to obtain a strict headcount in fulfillment of the constitutional mandate to conduct an "actual Enumeration," but also to gather demographic data about the population on matters such as race, sex, occupation, and, even citizenship. Moreover, it reveals that all three branches of the government—including the Supreme Court and lower courts—have blessed this dual use of the census, if not a citizenship question itself. In the face of that history and the broad constitutional grant of power to Congress, the Court cannot conclude that the Secretary lacks power under the Enumeration Clause to ask a question about citizenship on the census.

Third, although the Secretary has *authority* under the Enumeration Clause to direct the inclusion of a citizenship question on the census, the Court concludes that the particular *exercise* of that authority by Secretary Ross may have violated NGO Plaintiffs' rights to equal protection of the laws under the Due Process Clause of the Fifth Amendment. That is, assuming the truth of NGO Plaintiffs' allegations and drawing all reasonable inferences in their favor—as the Court must at this stage of the proceedings—they plausibly allege that Secretary Ross's decision to reinstate the citizen-

ship question on the 2020 census was motivated by discriminatory animus and that its application will result in a discriminatory effect. As discussed below, that conclusion is supported by indications that Defendants deviated from their standard procedures in hastily adding the citizenship question; by evidence suggesting that Secretary Ross's stated rationale for adding the question is pretextual; and by contemporary statements of decisionmakers, including statements by the President, whose reelection campaign credited him with "officially" mandating Secretary Ross's decision to add the question right after it was announced.

The net effect of these conclusions is that Defendants' motions to dismiss are granted in part and denied in part. In particular, Plaintiffs' claims under the Enumeration Clause—which turn on Secretary Ross's power rather than his purposes—must be and are dismissed. By contrast, their claims under the APA (which Defendants seek to dismiss solely on jurisdictional and justiciability grounds) and the Due Process Clause—which turn at least in part on Secretary Ross's purposes and not merely on his power—may proceed.

BACKGROUND

As noted, the Constitution requires an "actual Enumeration" of "the whole number of persons in each State" every ten years, and grants to Congress authority to conduct that enumeration—commonly known as the census—"in such Manner as [Congress] shall by Law direct." U.S. CONST. art. 1, § 2, cl. 3 & amend. XIV. The modern census is governed by the Census Act, which was enacted in 1976. *See* 13 U.S.C. §§ 1 *et seq.* The Act delegates to the Secretary of Commerce the duty to "take a decennial census of population as of

the first day of April of such year . . . in such form and content as he may determine." 13 U.S.C. § 141(a). It further provides that "[t]he Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in [the Act]." *Id.* § 5. The Secretary is required to submit "a report containing [his] determination of the questions proposed to be included" in the census "not later than 2 years before the appropriate census date." *Id.* § 141(f)(2). After the census is taken, the President is tasked with transmitting to Congress "a statement showing the whole number of persons in each State . . . as ascertained under the . . . decennial census of the population, and the number of Representatives to which each State" is "entitled." 2 U.S.C. § 2a(a).

Significantly, consistent with the constitutional text, the decennial census endeavors to count *all* residents of the United States, regardless of their legal status. *See Fed'n for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 576 (D.D.C. 1980) (three-judge court) ("The language of the Constitution is not ambiguous. It requires the counting of the 'whole number of persons' for apportionment purposes, and while illegal aliens were not a component of the population at the time the Constitution was adopted, they are clearly 'persons.'"). The federal government, however, has long used the decennial census to do more than take a mere headcount of the population for purposes of apportioning Representatives. It has also used the census as a means to collect data—demographic and otherwise—on the population of the United States. *See generally* U.S. CENSUS BUREAU, MEASURING AMERICA: THE DECENNIAL CENSUSES FROM 1790 TO 2000 ("MEASUR-

ING AMERICA") (2002), *available at* http://www2.census.gov/library/publications/2002/dec/pol_02-ma.pdf. Notably, that practice began with the nation's very first census, taken in 1790, which was conducted by United States Marshals. *See* Act of March 1, 1790 ("1790 Census Act"), 1 Stat. 101, 101-02 (1790).[3] Congress directed the Marshals to ask each household, among other things, about "the sexes and colours of free persons" as well the age of residents, *id.* at 101, in order to "assess the countries [*sic*] industrial and military potential," MEASURING AMERICA 5. As a history of the census prepared in 1900 for the Senate Committee on the Census described the first census: "Instead of providing simply for an enumeration of the population in 1790 . . . which would have answered all the requirements of the Constitution," Congress "called for [more information] . . . thus recognizing at the very outset the desirability of using the census as a means of securing data beyond the mere statement of population needed for apportionment purposes." CARROLL D. WRIGHT, THE HISTORY AND GROWTH OF THE UNITED STATES CENSUS ("HISTORY AND GROWTH"), S. Doc. No. 194, at 89 (1st Sess., 1900).

The inquiries on the second and third censuses were largely the same as the first. *See* MEASURING AMERICA 6; *see also* Act of Feb. 28, 1800 ("1800 Census Act"), 2 Stat. 11 (1800); Act of March 26, 1810, 2 Stat. 564 (1810). Unlike the first census, however, the second

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[3] The Court may and does take judicial notice of undisputed historical facts. *See Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273, 298-300 (S.D.N.Y. 2012) (noting that courts may take judicial notice of historical facts contained in undisputed, authoritative writings).

census also included a question about the town or city in which persons resided. *See* 1800 Census Act, 2 Stat. at 11-12. The third census, taken in 1810, also required the Marshals to give "an account of the several manufacturing establishments . . . within their several districts." Act of May 1, 1810, 2 Stat. 605, 605 (1810). Interestingly, civic groups—including the American Philosophical Society, led by Thomas Jefferson—encouraged Congress to add questions regarding citizenship (and other topics) as early as the second census, but those proposals were rejected at that point without debate. *See* WRIGHT, HISTORY AND GROWTH 19-20. For reasons that are not clear, however, Congress did add a question about citizenship to the fourth census in 1820, directing enumerators to tally the number of "Foreigners not naturalized." Act of March 14, 1820 ("1820 Census Act"), 3 Stat. 548, 550 (1820).

The fifth census in 1830—which was the first to rely on standardized, pre-printed forms—tallied all "white persons" who were "ALIENS—Foreigners not naturalized." Act of March 23, 1830 ("1830 Census Act"), 4 Stat. 383, 389 (1830). For unknown reasons, the sixth census in 1840 did not ask about citizenship or birthplace, although it did include nearly every other question that had been asked in the fifth census, including questions regarding occupation, mental illness, and military service. *See* WRIGHT, HISTORY AND GROWTH 142-43 (reprinting the inquiries on the sixth census). The scope of the census then expanded materially in 1850, when it was overseen, for the first time, by a "census board" composed of "the Secretary of State, the Attorney-General, and the Postmaster-General." *Id.* at 40. The census board prepared six "schedules" of inquiries, relating to "(1) free inhabitants, (2) slave

inhabitants, (3) mortality, (4) productions of agriculture, (5) products of industry, and (6) social statistics." *Id.* at 44-45. All "free inhabitants" were required to state their place of birth ("State, Territory, or country"), as well as the "[v]alue of real estate owned" and whether they were "deaf and dumb, blind, insane, idiotic, pauper, or convict." *See* Act of May 15, 1850 ("1850 Census Act"), 9 Stat. 428, 433 (1850). Although the 1850 census required inhabitants to state their place of birth, it did not explicitly ask about citizenship.

The questions in 1860 and 1870 were largely the same as those in 1850, although the 1870 census also included a question about whether the respondent's father or mother was "of foreign birth" and an explicit inquiry (no doubt prompted by the Civil War and ratification of the Fourteenth Amendment) as to "[m]ale [c]itizens of U.S. of 21 years of age and upwards, whose right to vote is denied or abridged on other grounds than rebellion or other crime." *See* MEASURING AMERICA 13. The 1880 census asked for the birthplaces of the respondent and of each respondent's parents ("naming the State or Territory of the United States, or the Country, if of foreign birth"). *See id.* at 17. The 1880 census was also the first to be conducted by a newly established census office, led by the Superintendent of the Census and lodged in the Department of the Interior. *See* WRIGHT, HISTORY AND GROWTH 58-59. The census office prescribed similar questions for the 1890 census, asking for the respondent's and his or her parents' places of birth and, additionally, whether the respondent was naturalized and whether "naturalization papers have been taken out." MEASURING AMERICA 22.

In the early 20th century, the federal government continued to use the census to gather data regarding citizenship and other topics.[4] The 1900, 1910, 1920, and 1930 censuses, in keeping with their immediate predecessors, asked about birthplace and parental birthplace; they also asked immigrant residents their year of immigration and whether they were naturalized. *Id.* at 34, 45-46, 58, 59. The 1940 census asked for residents' birthplace and for "[c]itizenship of the foreign born." *Id.* at 62. The 1940 census was also the first to include supplemental questions that went to only a sample fraction of the population; on the 1940 census, these supplemental inquiries included a question about parental birthplace. *Id.* at 63. The 1950 census also asked all respondents for their birthplace and whether foreign-born residents were naturalized, and asked a sample of the population supplemental questions about, among other things, parental birthplace. *Id.* at 66-68.

The 1960 census marked a departure from previous censuses in several respects. *See generally* MARGO J. ANDERSON, THE AMERICAN CENSUS: A SOCIAL HISTORY 201-06 (1988). For one, it was the first census to rely principally on the mail to distribute and collect questionnaires. U.S. BUREAU OF THE CENSUS, 1960 CENSUSES OF POPULATION AND HOUSING: PROCEDURAL

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[4] In between the 1900 and 1910 censuses, Congress created a permanent Census Office within the Department of Interior; the Census Office moved to the Department of Commerce and Labor the following year. *See* U.S. CENSUS BUREAU, FACTFINDER FOR THE NATION: HISTORY AND ORGANIZATION 2 (2000), *available at* https://www.census.gov/history/pdf/cff4.pdf. When the Department of Commerce and Labor split into two departments in 1913, the Census Office—renamed the Census Bureau—was placed in the Department of Commerce. *Id.*

HISTORY ("1960 CENSUSES OF POPULATION AND HOUSING") 1 (1966), *available at* http://www2.census.gov/prod2/decennial/documents/1960/proceduralHistory/1960proceduralhistory.zip. It was also the first census to pose the majority of questions to only a fraction of the population: The census posed only five questions to all respondents, with more detailed questions going to twenty-five percent of the population. MEASURING AMERICA 72. The five universal questions included the respondent's relationship to the head of household, sex, color or race, marital status, and month and year of birth. *See* 1960 CENSUSES OF POPULATION AND HOUSING 364. The lengthier questionnaire that went to a sample of the population included questions regarding respondents' and parental birthplace, highest level of education attained, salary earned, and how many working television sets a household had. *Id.* at 73-75.

Notably, the 1960 census was the first since 1840 not to include a question about citizenship (or birthplace) for all residents. It did, however, ask all residents of New York and Puerto Rico about citizenship—the former "at the expense of the State, to meet State constitutional requirements for State legislative apportionment" and the latter, at the request of a census advisory committee, "to permit detailed studies of migration." 1960 CENSUSES OF POPULATION AND HOUSING 10, 130. In a review of the census, the Census Bureau explained the decision not to ask all respondents about citizenship as follows: "It was felt that general census information on citizenship had become of less importance compared with other possible questions to be included in the census, particularly in view of the recent statutory requirement for annual alien registration which could provide the Immigration and

Naturalization Service, the principal user of such data, with the information it needed." *Id.* at 194.

Between 1970 and 2000, the census continued to feature a short questionnaire distributed to the vast majority of the population (known as the "short-form census") and a longer questionnaire, which included both the inquiries on the shorter questionnaire as well as additional questions, distributed to a sample of the population (known as the "long-form census"). During that time, none of the short-form questionnaires included a question about citizenship or birthplace. *See* MEASURING AMERICA 77 (1970), 84 (1980), 91 (1990), 100 (2000). But each long-form census, which went to approximately one sixth of households, did. *See id.* at 78 (1970), 85 (1980), 92 (1990), 101 (2000). In 2010, the Census Bureau dropped the long-form questionnaire altogether, a change that was precipitated by the introduction, in 2005, of the American Community Survey ("ACS"). *See* JENNIFER D. WILLIAMS, THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 3 (2011), *available at* https://www.census.gov/history/pdf/2010-background-crs.pdf. Unlike the decennial census, the ACS is conducted annually and is not used to obtain an "actual Enumeration" of the population for purposes of apportionment; instead, it is given each year to only about 3.5 million households—roughly one in every thirty-eight households in the country—for the sole purpose of collecting demographic data on the population. (SAC ¶¶ 74, 98 n.43). The ACS "requires citizens to disclose whether they were born in 'United States territories,' whether they were born 'abroad' to U.S. parents, or if and when they were 'naturalized.'"

(*Id.* ¶ 76).[5] The 2010 census asked about "the age, sex, race, and ethnicity (Hispanic or non-Hispanic) of each person in a household," as well as "whether the housing unit was rented or owned by a member of the household." WILLIAMS, THE 2010 DECENNIAL CENSUS: BACKGROUND AND ISSUES 3. It did not ask about citizenship.

Thus, the last time that the census asked *every* respondent about citizenship was sixty-eight years ago, in 1950. Notably, since then, the Census Bureau and former Bureau officials have opposed periodic efforts to reinstate a citizenship question on a universal basis. In 1980, for example, several plaintiffs (including the Federation for American Immigration Reform, which appears here as *amicus curiae* in support of Defendants) sued the Census Bureau, contending that the census was constitutionally required to count only citizens. *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 565. In that litigation, the Census Bureau argued that reinstating a citizenship question for all respondents would "inevitably jeopardize the overall accuracy of the population count" because noncitizens would be reluctant to participate, for fear "of the information being used against them." *Id.* at 568. Likewise, in Congressional testimony prior to the 1990 census, Census Bureau officials opposed reinstating a citizenship question for all respondents, opining that it could cause people to "misunderstand or mistrust the census and fail or refuse to respond." *Exclude Undocumented Residents from Census Counts Used for Apportion-*

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[5] A recipient of the ACS is required, under threat of fine, to respond—just as recipients of the census are. *See* 13 U.S.C. § 221(a).

ment: Hearing on H.R. 3639, H.R. 3814, and H.R. 4234 Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civil Serv., 100th Cong. 50-51 (1988) (statement of John G. Keane, Director, Bureau of the Census); *see also Census Equity Act: Hearings on H.R. 2661 Before the Subcomm. on Census & Population of the H. Comm. on Post Office & Civ. Serv.*, 101st Cong. 42-44 (1989) (statement of C. Louis Kincannon, Deputy Director, Bureau of the Census). Before the 2010 census, former Bureau Director Kenneth Prewitt testified before Congress to the same effect. See *Counting the Vote: Should Only U.S. Citizens Be Included in Apportioning Our Elected Representatives?: Hearing Before the Subcomm. on Federalism & the Census of the H. Comm. on Gov't Reform*, 109th Cong. 73 (2005) (statement of Kenneth Prewitt). And finally, just two years ago, several former Bureau Directors wrote in an *amicus curiae* brief to the Supreme Court (in a case about the use of total population in intrastate redistricting) that a "citizenship inquiry would invariably lead to a lower response rate to the Census." Brief of Former Directors of the U.S. Census Bureau as *Amici Curiae* in Support of Appellees at 25, *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

Earlier this year, however, the Census Bureau reversed course. Specifically, on March 26, 2018, Secretary Ross issued a memorandum directing the Census Bureau to reinstate the citizenship question on the 2020 decennial census. (SAC ¶ 3; *see also* Docket No. 173 ("Admin. Record"), at 1313-20 ("Ross Mem.")).[6]

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[6] Given the volume of the Administrative Record, Defendants did not file it directly on the docket. Instead, they made it

Secretary Ross asserted that he included the citizenship question in response to a letter from the Department of Justice ("DOJ") dated December 12, 2017. (SAC ¶ 94). The DOJ letter, in turn, requested the question's reinstatement on the grounds that more granular citizenship data was necessary to enforce Section 2 of the Voting Rights Act, which prohibits discriminatory voting laws. (*Id.* ¶ 95). After considering several options—including maintaining the *status quo* and using "administrative records to calculate citizenship data," (*id.* ¶ 81 (internal quotation marks omitted)) —the Secretary concluded that the "value of more complete citizenship data outweighed concerns regarding non-response." (*Id.* ¶ 82). Two days later, President Trump's campaign sent an e-mail to supporters stating that "President Trump has officially mandated that the 2020 United States Census ask people living in America whether or not they are citizens." (NGO Compl. ¶ 178).

These lawsuits (and others, elsewhere) followed.

LEGAL STANDARDS

Defendants move to dismiss pursuant to Rules 12(b)(1) and 12(b)(6). A Rule 12(b)(1) motion challenges the court's subject-matter jurisdiction to hear the case. "A case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "In resolving a motion to dismiss under Rule 12(b)(1), the district court

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publicly available at http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20%5bCERTIFICATION-INDEX-DOCUMENTS%5d%206.8.18.pdf.

must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Fountain v. Karim*, 838 F.3d 129, 134 (2d Cir. 2016) (quoting *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014)). Additionally, a court "may consider affidavits and other materials beyond the pleadings to resolve the jurisdictional issue, but [the Court] may not rely on conclusory or hearsay statements contained in the affidavits." *J.S. ex rel. N.S. v. Attica Cent. Schs.*, 386 F.3d 107, 110 (2d Cir. 2004). Ultimately, "[t]he plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transp. Sys., Inc.*, 426 F.3d 635, 638 (2d Cir. 2005).

By contrast, a Rule 12(b)(6) motion tests the legal sufficiency of a complaint and requires a court to determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). When ruling on a Rule 12(b)(6) motion, a court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See, e.g., Holmes v. Grubman*, 568 F.3d 329, 335 (2d Cir. 2009). To survive such a motion, however, the plaintiff must plead sufficient facts "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556); *see also Twombly*, 550 U.S. at 570 (noting that a claim must be dismissed if the

plaintiffs "have not nudged their claims across the line from conceivable to plausible").

DISCUSSION

Defendants make four arguments with respect to the operative complaints in both cases, and one argument unique to NGO Plaintiffs' Complaint in 18-CV-5025. First, they contend that Plaintiffs in both cases lack Article III standing because Plaintiffs do not allege an injury-in-fact that is fairly traceable to Defendants' conduct. (*See* Docket No. 155 ("Defs.' Br."), at 13-21). Second, they assert that all of the claims pressed by Plaintiffs are barred by the political question doctrine. (*See id.* at 21-26). Third, they insist that the decision as to what questions should be included in the census questionnaire is committed by law to agency discretion and, thus, that Secretary Ross's decision is not subject to judicial review under the APA. (*See id.* at 26-30). Fourth, they aver that Plaintiffs fail to state a claim under the Enumeration Clause. (*See id.* at 30-35). And finally, they argue that NGO Plaintiffs fail to state an equal protection claim under the Due Process Clause. (*See* 18-CV-5025, Docket No. 39 ("Defs.' NGO Br."), at 16-19). The Court will address each of those arguments in turn.

A. Standing

Article III of the Constitution restricts the "judicial Power" of the United States to "Cases" and "Controversies." U.S. CONST. art. III, § 2. In light of that restriction, a party invoking the court's jurisdiction—the plaintiff—must have "standing" to sue. *See, e.g.*, *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). To have standing, a plaintiff must establish

three elements. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Specifically, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan*, 504 U.S. at 560-61). Significantly, each element "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. At the pleading stage, a plaintiff need only "clearly . . . allege facts demonstrating" each element. *Warth v. Seldin*, 422 U.S. 490, 518 (1975); *see also John v. Whole Foods Mkt. Grp., Inc.*, 858 F.3d 732, 736 (2d Cir. 2017) ("[B]ecause [the defendant] mounts only a 'facial' challenge to [the plaintiff's] allegations of standing, [the plaintiff] bears no evidentiary burden at the pleading stage."); *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56 (2d Cir. 2016) ("When the Rule 12(b)(1) motion is facial, . . . [t]he task of the district court is to determine whether the Pleading allege[s] facts that affirmatively and plausibly suggest that [the plaintiff] has standing to sue." (second and third alterations in original) (internal quotation marks omitted)). Further, where there are multiple plaintiffs, as here, only one must establish the elements of standing for the case to proceed. *See, e.g., Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017).

In this case, Defendants contend that Plaintiffs fail to establish that they have been injured in fact and that any injury is traceable to the challenged conduct. (*See* Defs.' Br. 13-14). Additionally, they make a handful of arguments specific to whether NGO Plain-

tiffs have standing. (*See* Defs.' NGO Br. 4-15). The Court will address the common arguments first.

1. Injury-in-Fact

The injury-in-fact requirement is meant to "ensure that the plaintiff has a 'personal stake in the outcome of the controversy.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Warth*, 422 U.S. at 498). To establish injury-in-fact, a plaintiff must demonstrate an injury that is "concrete, particularized, and actual or imminent." *Clapper*, 568 U.S. at 409. "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative. . . . " *Id.* Nevertheless, a plaintiff may allege a "future injury" if he or she shows that "the threatened injury is 'certainly impending,' *or* there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List*, 134 S. Ct. at 2341 (emphasis added) (quoting *Clapper*, 568 U.S. at 409, 414 n.5 (2013)).[7] Plaintiffs easily meet their burden at this stage of the proceedings.

Plaintiffs' theory of injury proceeds in two steps, each of which is amply supported by allegations in their

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[7] Defendants suggest that the "substantial risk" formulation applies only in food and drug cases (*see* Docket No. 190 ("Defs.' Reply Br."), at 4-5), but that suggestion is supported by neither logic nor law. Indeed, it is belied by both *Clapper*, in which the Supreme Court cited to non-food and drug cases, *see* 568 U.S. at 414 n.5 (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)), and *Susan B. Anthony List*, another non-food and drug case in which the Supreme Court expressly reaffirmed the "substantial risk" formulation. *See* 134 S. Ct. at 2341; *accord Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016).

operative complaints—allegations that the Court must assume are true in deciding this motion. First, Plaintiffs contend that Defendants' inclusion of a citizenship question on the census will "drive down response rates and seriously impair the accuracy of the decennial population count." (SAC ¶ 39; *accord* NGO Compl. ¶ 4). In support of that assertion, Plaintiffs proffer an array of evidence—much of it from Defendants themselves. For instance, Plaintiffs cite the Census Bureau's own argument in 1980 that "any effort to ascertain citizenship will inevitably jeopardize the overall accuracy of the population count" because "[q]uestions as to citizenship are particularly sensitive in minority communities and would inevitable trigger . . . refusal to cooperate." (SAC ¶ 40 (quoting *Fed'n for Am. Immigration Reform*, 486 F. Supp. at 568); *accord* NGO Compl. ¶ 84). Plaintiffs also cite testimony, interviews, and an *amicus* brief filed by former Directors of the Census Bureau, arguing in sum and substance that the "citizenship inquiry would invariably lead to a lower response rate to the Census in general." (SAC ¶¶ 39-47; *accord* NGO Compl. ¶¶ 81-90). Moreover, Plaintiffs plausibly allege that this risk is "heightened in the current political climate because of President Trump's anti-immigrant rhetoric." (SAC ¶ 48; *accord* NGO Compl. ¶¶ 113-26, 140-46). Accordingly, Plaintiffs claim, Defendants' actions "will add to this unprecedented level of anxiety in immigrant communities," leading to "non-response and lower participation by many immigrants." (SAC ¶ 53; *accord* NGO Compl. ¶¶ 141-46).

The second step in Plaintiffs' argument is that this "undercounting" will result in various concrete harms to them and their constituents or members. (*See, e.g.*, SAC ¶ 105 ("[I]n 2014, New York State had the fourth

largest population of undocumented residents in the nation."); *see id.* ¶¶ 104-38; *see also, e.g.*, NGO Compl. ¶ 52 ("Make the Road New York members . . . will be deprived of political influence and funding. . . . ")). For example, Plaintiffs identify various federal programs, including "the Highway Trust Fund program, the Urbanized Area Formula Funding program, the Metropolitan Planning program, and the Community Highway Safety Grant program," which "distribute funds based, at least in part, on population figures collected through the decennial census." (SAC ¶ 140 (citing 23 U.S.C. § 104(d)(3); 49 U.S.C. §§ 5305, 5307, 5340; 23 U.S.C. § 402); *see id.* ¶ 145 ("Plaintiffs will lose millions of dollars in [Medicaid] reimbursement as a result of even a 1% undercount."); *see also* NGO Compl. ¶ 197 (identifying the Federal Medical Assistance Percentage, the Highway Trust Fund program, and other programs that rely on population figures from the census)). Additionally, they note that the Department of Education relies on census data to determine certain funding for schools in their jurisdictions. (*See, e.g.*, SAC ¶ 143(a)-(v)). Citing these programs, they plausibly allege that an undercount in their jurisdictions will "depriv[e] them of their statutory fair share of federal funding, and remov[e] crucial resources for important government services." (*Id.* ¶ 139; *accord* NGO Compl. ¶ 52). That alone is sufficient to confer standing. *See, e.g.*, *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980) (*per curiam*) (holding that New York City, New York State, and several individual voters had standing to challenge "a census undercount" by alleging harm "in the form of dilution of [the individual plaintiffs'] votes," and, for the government plaintiffs, "as recipients of federal funds"). But on top of that,

Government Plaintiffs also plausibly allege that an undercount "will lead to loss of representation in Rhode Island"—which is apparently teetering on the edge of losing one of its two Representatives already—and will the "harm representational interests" of local government Plaintiffs "within their states." (SAC ¶¶ 160-63). That, too, is sufficient. *See, e.g.*, *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331 (1999) (observing that the "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement" of standing).

In response, Defendants contend that Plaintiffs' allegations are "too speculative" because they rely on a highly attenuated chain of inferences. (Defs.' Br. 14). That may ultimately prove to be the case, but Defendants' contentions are misplaced at this stage in the litigation, when Plaintiffs "bear[] no evidentiary burden." *John*, 858 F.3d at 736. Citing a memorandum authored by Secretary Ross, for example, Defendants claim that "there is little 'definitive, empirical' evidence regarding the effect of adding a citizenship question." (Defs.' Br. 15). But Plaintiffs allege otherwise, citing ample evidence—spanning decades and much of it from the Census Bureau itself—in support of the proposition that including a citizenship question will cause an undercount. (*See* SAC ¶¶ 3[illegible]-47; *accord* NGO Compl. ¶¶ 81-90). Moreover, Plaintiffs cite testing that the Census Bureau conducted in 2017 that tended to show that "fears, particularly among immigrant respondents, have increased markedly this year." (SAC ¶ 51; *accord* NGO Compl. ¶¶ 113-26). These findings, the Census Bureau explained, "have implications for data quality and nonresponse." (SAC ¶ 52; *accord* NGO Compl. ¶ 127). For the time being, those allegations are suf-

ficient to establish Plaintiffs' point. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 168 (1997) ("[W]hile a plaintiff must set forth by affidavit or other evidence specific facts to survive a motion for summary judgment, and must ultimately support any contested facts with evidence adduced at trial, at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." (internal quotation marks, brackets, and citation omitted)). Defendants' reliance on contrary evidence merely raises disputes of fact that the Court may not resolve on a motion to dismiss. *See, e.g.*, *Lujan*, 504 U.S. at 561.

Next, Defendants claim that the Census Bureau "has extensive procedures in place to address non-response and to obtain accurate data for those households that decline to respond." (Defs.' Br. 15). Defendants repackaged this argument slightly in their reply brief, (Defs.' Reply Br. 4), and at oral argument, (Oral Arg. Tr. 12), claiming that Plaintiffs fail to distinguish between the *initial* "self-response" to the written census form, and the "non-response followup" employed by the Census Bureau to reach initial non-responders. As Defendants see it, Plaintiffs allege only that the initial self-response rate will decrease; they fail to consider that the non-response followup could cure any diminished self-response. (Defs.' Reply Br. 4). However packaged, though, those arguments are also factual and thus premature. Moreover, they ignore well-pleaded allegations in Plaintiffs' complaints. Plaintiffs allege broadly that adding the citizenship question will "significantly deter[] *participation*" in the census. (SAC ¶ 5 (emphasis added); *accord* NGO Compl. ¶ 141 (alleg-

ing that "adding the citizenship question" will "reduc[e] participation by Latinos and Immigrants of color")). And Plaintiffs support that assertion with concrete allegations, citing, for example, reports from the Census Bureau that census respondents "sought to break off interviews" because of "concerns about data confidentiality and the government's negative attitudes toward immigrants." (SAC ¶ 51; *accord* NGO Compl. ¶¶ 133-37). In other words, Plaintiffs plausibly allege that the addition of the citizenship question will affect not only the initial response rate to the questionnaire itself, but also cooperation with the in-person followup.

Finally, Defendants claim that Plaintiffs' allegations regarding loss of representation and federal funding are "too speculative" because apportionment and the allocation of funds are both "complex" and could be affected by, among other things, "potential undercounting in other states." (Defs.' Br. 16-18).[8] But that argument is squarely foreclosed by *Carey*, in which the Second Circuit held that New York City and New York State had standing to challenge the Census Bureau's conduct during the 1980 census because they

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[8] Defendants also complain that Government Plaintiffs "do not explain" how the states at issue might lose representation in Congress. (Defs.' Br. 18). At this stage, however, the Court "presum[es] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. Government Plaintiffs allege that if Rhode Island's population count drops by a mere 157 people, it will result in the loss of a Representative, and they explicitly allege that "an undercount resulting from Defendants' decision to add a citizenship demand will lead to loss of representation" in the state. (SAC ¶ 160; *see also id.* ¶ 162 ("An undercount of immigrant communities in [New York and Illinois] will result in losses of these seats. . . . ")).

had "made a showing . . . that Census Bureau actions in New York State have caused a disproportionate undercount which will result in loss of representation" and "decreased federal funds . . . under revenue sharing." 637 F.2d at 838; *see also, e.g., City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993) ("Plaintiffs . . . have standing to challenge the [Secretary's] actions based upon their claim that the census undercount will result in a loss of federal funds to the City of Detroit.").[9] Defendants try to distinguish *Carey* on the ground that it "did not involve allegations of injuries from the mere inclusion of a question," (Defs.' Br. 17 n.8), but that consideration is irrelevant to the standing inquiry. Equally irrelevant is the fact that the Second Circuit "cited New York City's 'present financial condition' in finding that the city and the state had standing as recipients of federal funds." (*Id.*). The loss of federal funds constitutes injury whether or not a jurisdiction is in sound fiscal shape, and nothing in *Carey* suggests that the Court's passing reference to the financial condition of New York City (not the State) was essential to its holding. Finally, the fact that *Carey* analyzed standing after preliminary results from the census had been tabulated—a point that Defendants pressed at oral argument, (*see* Oral Arg. Tr. 8-9)—is merely a difference in degree. Put simply, the Circuit did not demand the kind of rigorous proof that an undercount would result in the loss of representa-

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[9] Defendants seize on the *Carey* Court's use of the word "showing," (Defs.' Br. 16), but it merely reflects the procedural posture of the case—namely, an appeal from the grant of a preliminary injunction. Plaintiffs here have made the requisite "showing" by way of the allegations in their Second Amended Complaint, which the Court must assume to be true.

tion and federal funds that Defendants here demand. *See also U.S. House of Representatives*, 525 U.S. at 332 (finding standing to bring a challenge in advance of the census based on "the threat of vote dilution" and noting that "it is certainly not necessary . . . to wait until the census has been conducted to consider the issues presented here, because such a pause would result in extreme—possibly irremediable—hardship").

In short, taking Plaintiffs' allegations as true, the Court concludes that they establish a "substantial risk" of harm and thus satisfy the injury-in-fact requirement.

2. Traceability

As noted, to establish Article III standing, a plaintiff must also demonstrate that his or her injury is "fairly traceable" to the challenged actions of the defendant. *Lujan*, 504 U.S. at 561 (ellipsis and brackets omitted). In other words, a plaintiff "must demonstrate a causal nexus between the defendant's conduct and the injury." *Chevron Corp.*, 833 F.3d at 121. On a motion to dismiss, plaintiffs have only a "relatively modest" burden to allege that "their injury is 'fairly traceable'" to the defendant's conduct. *Bennett*, 520 U.S. at 171. But that burden is harder to carry where, as here, traceability "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan*, 504 U.S. at 562. In such a case, "it becomes the burden of the plaintiff to adduce facts showing that" the choices of these independent actors "have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.*; *see also, e.g.*, *Bennett*, 520 U.S. at 169 (holding that a plaintiff may

meet the traceability requirement by alleging that a defendant's conduct has a "determinative or coercive effect upon the action of someone else"). At the same time, "it is well-settled that for standing purposes, [plaintiffs] need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test. This is true even in cases where the injury hinges on the reactions of the third parties . . . to the agency's conduct." *Nat. Res. Def. Council v. Nat'l Highway Traffic Safety Admin.* ("*NRDC*"), 894 F.3d 95, 104 (2d Cir. 2018). Thus, the "fact that the defendant's conduct may be only an 'indirect[]' cause is 'not necessarily fatal to standing.'" *Chevron Corp.*, 833 F.3d at 121 (alteration in original) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976)).

The Second Circuit's recent decision in *NRDC* is instructive. In that case, the petitioners—five states and three nonprofit organizations—claimed that the National Highway Traffic Safety Administration ("NHTSA") violated the APA when it indefinitely delayed the effective date of a rule that would have increased penalties for violations of certain vehicle environmental standards. *NRDC*, 894 F.3d at 100. The petitioners claimed environmental injuries stemming from the indefinite delay of the rule. *Id.* at 103-04. NHTSA argued, *inter alia*, that the petitioners' injuries were "too indirect to establish causation and redressability" because they relied on the uncertain reactions of third parties—namely, vehicle manufacturers—to the increased penalties. *Id.* at 104. The Second Circuit rejected NHTSA's argument, finding that the petitioners had demonstrated "the required nexus between inappropriately low penalties and harm to Petitioners."

Id. Citing "the agency's own pronouncements," as well as "[c]ommon sense and basic economics," the Court concluded that "the increased penalty has the potential to affect automakers' business decisions and compliance approaches" in a manner that would harm the petitioners. *Id.* at 105 (alteration in original). Specifically, the Court noted that "NHTSA itself has concluded that emissions reductions from compliance with higher fuel economy standards would result in significant declines in the adverse health effects that result from population exposure to these pollutants." *Id.* (internal quotation marks and citation omitted).

Applying those standards to Defendants' motions to dismiss, Plaintiffs meet their traceability burden. Plaintiffs allege that reinstating the citizenship question "will lead to nonresponse and lower participation" in the census, which will, in turn, cause financial and representational injuries to Plaintiffs. (SAC ¶ 53; *see id.* ¶ 159 (alleging that adding a citizenship question will "depress[] participation in the decennial census within Plaintiffs' diverse naturalized, documented, and undocumented immigrant populations"); *see also* NGO Compl. ¶¶ 4-5). Plaintiffs further allege that "immigrant respondents are . . . increasingly concerned about confidentiality and data sharing in light of the current anti-immigrant rhetoric," and "may seek to protect their own privacy or the privacy of their household" by not responding to the census. (SAC ¶¶ 50, 53; *accord* NGO Compl. ¶ 127). Moreover, like the petitioners in *NRDC*, Plaintiffs support these allegations with evidence from Defendants themselves. (*See, e.g.*, SAC ¶ 51 ("Census Bureau officials have noted that in routine pretests conducted from February 2017 to September 2017, 'fears, particularly among immigrant respond-

ents, have increased markedly this year.'"); *id.* ¶ 52 (quoting the Census Bureau's conclusion that their findings after a census pretest were "particularly troubling given that they impact hard-to-count populations disproportionately, and have implications for data quality and nonresponse"); NGO Compl. ¶¶ 81-90). Plaintiffs thus plead a "substantial likelihood of the alleged causality." *NRDC*, 894 F.3d at 104.

Relying heavily on the Supreme Court's decisions in *Clapper* and *Simon*, Defendants contend that "the intervening acts of third parties"—namely, those who refuse to comply with their legal duty to respond to the census questionnaire—break the chain of causation in these cases for purposes of standing. (Defs.' Br. 19-20). But that argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett*, 520 U.S. at 168-69. Moreover, *Clapper* and *Simon* are distinguishable. For one, both of those cases were decided on summary judgment, at which point the plaintiffs could "no longer rest on . . . mere allegations, but" had to "set forth by affidavit or other evidence specific facts." *Clapper*, 568 U.S. at 412 (alteration in original) (internal quotation marks omitted); *see Simon*, 426 U.S. at 35.[10] Further, the chains of causation in *Clapper* and *Simon* were significantly more attenuated than the one here. In *Clapper*, the plaintiffs' theory of injury depended on a chain of causation with five discrete links, each of

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[10] Additionally, the standing inquiry in *Clapper* was "especially rigorous" because it involved the "review [of] actions of the political branches in the fields of intelligence gathering and foreign affairs." 568 U.S. at 408-09.

which "rest[ed] on [the plaintiffs'] highly speculative fear that" governmental actors or courts would exercise their nearly unfettered discretion in a particular way. 568 U.S. at 410-14. And in *Simon*, the Court found that it was "purely speculative" to attribute the choice of hospitals to deny the indigent plaintiffs services to decisions of the Treasury Department, as opposed to "decisions made by the hospitals without regard to the tax implications." 426 U.S. at 41-43. The chain of causation here—that Defendants' actions will increase non-response rates of certain populations and that the resulting undercount, in turn, will cause harm —is neither as long nor as speculative as the chains in *Clapper* and *Simon*.[11]

The injuries alleged in *Clapper* and *Simon* also differ in an important respect from the injuries alleged in the instant cases. In those two cases, the plaintiffs' standing turned on their ability to prove that the defendants' conduct would cause injury to *particular* individuals. That is, in *Clapper*, each plaintiff had to show that his or her own communications would likely

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[11] With respect to the local government Plaintiffs who allege injury stemming from intra-state redistricting based on census data, Defendants note that "states are not required to use unadjusted census figures in such actions." (Defs.' Br. 21). The contention that this breaks the chain of causation for traceability purposes is foreclosed by *U.S. House of Representatives*, in which the Supreme Court held that the plaintiffs "established standing on the basis of the expected effects of the use of sampling in the 2000 census on intrastate redistricting." 525 U.S. at 332. There, as here, (*see* SAC ¶ 164), the plaintiffs alleged that "several of the States in which these counties [in which the plaintiffs resided] are located require use of federal decennial census population numbers for their state legislative redistricting." *Id.* at 333.

be intercepted by surveillance conducted pursuant to the provisions at issue. *See* 568 U.S. at 410-12. And in *Simon*, the plaintiffs had to show that particular indigent individuals were denied service at a hospital on account of the defendants' conduct. *See* 426 U.S. at 40. The plaintiffs in those cases could not make a showing at that level of specificity. In these cases, by contrast, the alleged injuries are aggregate or communal in nature. That is, Plaintiffs do not need to show that a particular person will be deterred by Defendant's conduct from responding to the census; instead, their ability to prove injury that is fairly traceable to Defendants' actions turns on whether they can show that Defendants' conduct is likely to result in an undercount at the aggregate level, something that can presumably be done through surveys or other statistical proof. Plaintiffs may or may not be able to make that showing when the time comes, but that is a question for another day. Given the allegations in Plaintiffs' operative complaints, including those based on Defendants' own evidence, they have done enough to survive the present motions.[12]

Finally, Defendants make much of the fact that the actions of the intervening third parties—namely, residents who fail to respond to the census—would be illegal. (Defs.' Br. 20; 18-CV-5025, Docket No. 58

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[12] For similar reasons, there is no merit to Defendants' contention that "it likely would be impossible to isolate and quantify the number of individuals who would have responded but for addition of the citizenship question." (Defs.' Br. 20). Given that Plaintiffs allege injuries stemming from the aggregate effect of adding the citizenship question, they do not need to identify who would have answered the census but for the inclusion of the citizenship question.

("Defs.' NGO Reply Br."), at 2-3).[13] That is true, *see* 13 U.S.C. § 221(a) (establishing a fine for persons who do not respond to the census), but irrelevant to the question of standing, which turns only on whether the actions of the defendant can fairly be said to cause injury to the plaintiff. The D.C. Circuit's decision in *Attias v. CareFirst, Inc.*, 865 F.3d 620 (D.C. Cir. 2017), is on point. In that case, the plaintiffs brought breach of contract, negligence, and consumer-protection law claims against CareFirst following a breach of CareFirst's computer systems, including a database containing its customers' personal information. *Id.* at 623. The plaintiffs alleged that they faced an increased risk of identity theft as a result of the defendant's negligence. The Court recognized standing in spite of the fact that the plaintiffs' ability to prove injury depended upon a showing that intervening third parties—data hackers—would break the law. *Id.* at 629. The Court explained that, while "the thief would be the most immediate cause of plaintiffs' injuries, . . . Article III standing does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those inju-

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[13] In support of that argument, Defendants cite *United States v. Sanchez-Gomez*, 138 S. Ct. 1532 (2018), for the proposition that "courts 'have consistently refused to conclude that the case-or-controversy requirement is satisfied by the possibility that a party will . . . violat[e] valid criminal laws.'" (Defs.' NGO Reply Br. 2 (quoting *Sanchez-Gomez*, 138 S. Ct. at 1541). But *Sanchez-Gomez* concerned mootness and whether a plaintiff could invoke the capable-of-repetition-but-evading-review exception based on the possibility that he or she would violate the law in the future; the case has nothing to do with the traceability requirement for standing purposes.

ries be 'fairly traceable' to the defendant." *Id.* So too here: Plaintiffs plausibly allege that adding the citizenship question will result in a disproportionate number of people not responding to the census in their jurisdictions and that this non-response, in turn, will cause them injury. That is a sufficient showing of traceability at this stage of the proceedings and, thus, sufficient to show standing.[14]

3. NGO Plaintiffs' Standing

As noted, Defendants make a handful of additional arguments with respect to the standing of NGO Plaintiffs —namely, that they lack standing to sue on their own behalf, that they lack standing to sue on behalf of their members, and that they lack "third-party" standing to assert the constitutional rights of their members. (*See* Defs.' NGO Br. 4-15). For an organization to establish standing to bring suit on behalf of its members—known as "associational standing"—the organization

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[14] In addition to arguing that Plaintiffs lack Article III standing, Defendants contend that Plaintiffs lack "prudential standing" because their alleged injuries are not "within the zone of interests protected by the Constitution's Enumeration Clause." (Defs.' Br. 17). Whether a "plaintiff [comes] within the zone of interests for which [a] cause of action [is] available . . . . has nothing to do with whether there is a case or controversy under Article III." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 (1998); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 n.4 (2014) ("[T]he absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case."). Given that, and the Court's conclusion that Plaintiffs fail to state a claim under the Enumeration Clause, the Court need not and does not address Defendants' zone-of-interests argument.

must show that: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

Here, at least one NGO Plaintiff—namely, Make the Road New York ("Make the Road")—plainly satisfies those requirements. Make the Road "has more than 22,000 members who reside in New York City, Long Island and Westchester County." (NGO Compl. ¶ 50). Its "mission is to build the power of immigrant and working class communities to achieve dignity and justice." (*Id.* ¶ 49). The Complaint alleges that the organization's members reside in communities where "Latino immigrant populations . . . exceed the national and state averages." (*Id.* ¶ 51). It further alleges that New York State and its subdivisions use census data to draw congressional, state legislative, and municipal legislative districts. (*Id.* ¶¶ 72-73). Consequently, the Complaint alleges, the undercount likely caused by including the citizenship question "will reduce" both "the amount of federal funds" distributed to the communities in which Make the Road members live and their "political power." (*Id.* ¶ 52; *see also id.* ¶ 73 ("[W]hen a local community in any of these [jurisdictions] is disproportionately undercounted in the Decennial Census, the community will be placed in a malapportioned legislative district that has greater population that other legislative districts in the same state.")). Notably, the Complaint specifically identifies one such member, Perla Lopez of Queens County, which has a large population of Latino and immigrant residents.

(*Id.* ¶ 53). Affidavits—which the Court may consider, *see Thompson v. Cty. of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994)—identify others, including a resident of Nassau County, where the "number of Latino and immigrant residents . . . far exceed[s] the New York state average." (18-CV-5025, Docket No. 49 ("NGO Pls.' Br."), Ex. 3, ¶ 21).

These allegations suffice to establish that Make the Road has associational standing. As discussed above, the Second Circuit and Supreme Court have made clear that both fiscal and representational injuries resulting from an alleged undercount are sufficient to support standing. *See Carey*, 637 F.2d at 838 ("[C]itizens who challenge a census undercount on the basis, *inter alia*, that improper enumeration will result in loss of funds to their city have established both an injury fairly traceable to the Census Bureau and a substantial probability that court intervention will remedy the plaintiffs' injury."); *U.S. House of Representatives*, 525 U.S. at 332 ("[T]he threat of vote dilution . . . is concrete and actual or imminent, not conjectural or hypothetical." (internal quotation marks omitted)). Further, these cases stand for the proposition that individuals, like Ms. Lopez, have standing to raise fiscal and representational injuries. *See Carey*, 637 F.2d at 838 ("The individual plaintiffs in this case have alleged concrete harm in the form of dilution of their votes and decreased federal funds flowing to their city and state, thus establishing their standing."); *see also City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) (holding that residents of Philadelphia had standing to challenge alleged undercount because "[e]ven if none of the named plaintiffs personally receives a dollar of state or federal aid, all enjoy the benefits yielded when

the City is enabled to improve quality of life through the receipt of this money"). Nothing more is required at this stage of the proceedings.

Defendants also contend that NGO Plaintiffs lack standing to bring their equal protection claim because they fail to "satisfy the third-party standing exception to the general rule against asserting the rights of others." (Defs.' NGO Br. 13-15). Defendants' invocation of the third-party standing doctrine is inapt, however, as Make the Road plainly has associational standing to bring an equal protection claim, and thus need not rely on the third-party standing doctrine. That NGO Plaintiffs' claim sounds in equal protection is of no moment for the associational standing inquiry. *See, e.g., N.Y. State Club Ass'n, Inc. v. City of N.Y.*, 487 U.S. 1, 9 (1988) (holding that an association had standing to bring a constitutional claim on behalf of its members because the members "would have standing to bring this same suit"); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 669 n.6 (1993) (holding that, on "the current state of the record," an association of contractors had standing to bring an Equal Protection Clause challenge on behalf of its members); *Thomas v. City of N.Y.*, 143 F.3d 31, 36 n.9 (2d Cir. 1998) (finding that associations of livery car drivers had standing to bring an Equal Protection Clause challenge on behalf of their members). Notably, the Second Circuit has held that in cases such as this one, where plaintiffs seek declaratory and injunctive relief only, the third prong of the associational standing inquiry—whether the relief requested requires the participation of individual members in the lawsuit—is likely to be satisfied. *See, e.g., Bldg. & Constr. Trades Council of Buffalo v. Downtown Dev.,*

Inc., 448 F.3d 138, 150 (2d Cir. 2006) ("[W]here the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members, the *Hunt* test may be satisfied." (quoting *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004)).

In sum, the Court concludes that Make the Road has associational standing. Accordingly, it need not and does not address the standing of the other NGO Plaintiffs or Defendants' other arguments. *See, e.g., Centro de la Comunidad Hispana de Locust Valley*, 868 F.3d at 109 ("It is well settled that where, as here, multiple parties seek the same relief, 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'" (quoting *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006))).

B. The Political Question Doctrine

Next, Defendants contend that all of Plaintiffs' claims should be dismissed on the basis of the political question doctrine. (Defs.' Br. 21-26). Although a court generally has "a responsibility to decide cases properly before it," there is a well-established but "narrow exception to that rule, known as the political question doctrine." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194-95 (2012) (internal quotation marks omitted). That doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill suited to make such decisions, as courts are fundamentally underequipped to formulate national

policies or develop standards for matters not legal in nature." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (internal quotation marks omitted). More specifically, a case "involves a political question . . . where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Zivotofsky*, 566 U.S. at 195 (ellipsis in original) (internal quotation marks omitted). Citing the language in the Enumeration Clause providing that the "actual Enumeration shall be made . . . *in such Manner as [Congress] shall by Law direct*," U.S. CONST., art. I, § 2, cl. 3 (emphasis added), Defendants contend that this is such a case. (Defs.' Br. 23). It follows, they argue, that courts have no role whatsoever to play in reviewing decisions of the Secretary, to whom Congress has delegated its authority over the census.

Defendants have a tough sell because courts, including the Supreme Court and the Second Circuit, have entertained challenges to the conduct of the census for decades and, more to the point, have consistently rejected application of the political question doctrine in such cases. *See, e.g.*, *U.S. Dep't of Commerce v. Montana*, 503 U.S. 442, 459 (1992); *Utah v. Evans*, 536 U.S. 452 (2002); *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Wisconsin v. City of N.Y.*, 517 U.S. 1 (1996); *Carey*, 637 F.2d at 838; *Young v. Klutznick*, 497 F. Supp. 1318, 1326 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981); *City of Philadelphia*, 503 F. Supp. at 674; *Texas v. Mosbacher*, 783 F. Supp. 308, 312 (S.D. Tex. 1992); *District of Columbia v. U.S. Dep't of Commerce*, 789 F. Supp. 1179, 1185 (D.D.C. 1992); *City of N.Y. v. U.S. Dep't of Commerce*,

739 F. Supp. 761, 764 (E.D.N.Y. 1990); *U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 95 (D.D.C. 1998) (three-judge court), *aff'd*, 525 U.S. 316; *Prieto v. Stans*, 321 F. Supp. 420 (N.D. Cal. 1970); *see also Morales v. Daley*, 116 F. Supp. 2d 801 (S.D. Tex. 2000), *aff'd sub nom. Morales v. Evans*, 275 F.3d 45 (5th Cir. 2001) (unpublished). *But cf. Tucker v. U.S. Dep't of Commerce*, 958 F.2d 1411, 1417 (7th Cir. 1992) ("So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this. . . . "). Those courts have acknowledged that "[t]he text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin*, 517 U.S. at 19 (quoting U.S. CONST., art. I, § 2, cl. 3). Yet, time and again, they have recognized that the judiciary has at least some role to play in reviewing the conduct of the political branches with respect to the decennial census.[15]

Defendants contend that those cases are all distinguishable because they challenged whether the government had conducted an "actual Enumeration," while the instant case challenges the "manner" in which the census was conducted. (Defs.' Reply Br. 7-8). But

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[15] Admittedly, the Supreme Court did not explicitly address the political question doctrine in either *Evans* or *Wisconsin*. Nevertheless, there is authority for the proposition that the political question doctrine is a "jurisdictional limitation," *Hourani v. Mirtchev*, 796 F.3d 1, 12 (D.C. Cir. 2015); *see also Franklin*, 505 U.S. at 801 n.2 (plurality opinion) (citing *Montana* in dismissing the argument "that the courts have no subject-matter jurisdiction over this case because it involves a 'political question'")—in which case, the Court would have had an obligation to raise it "*sua sponte*," *Steel Co.*, 523 U.S. at 93.

that is not true. In fact, at least two of the cases involved challenges to the census questionnaire itself—precisely the kind of challenge brought here. *See Morales*, 116 F. Supp. 2d at 809; *Prieto*, 321 F. Supp. at 121-22. And in *Carey*—which is binding on this Court—the Second Circuit explicitly described the plaintiffs' suit as a challenge to "the *manner* in which the Census Bureau conducted the 1980 census in the State of New York," 637 F.2d at 836 (emphasis added); *see also id.* ("[Plaintiffs'] basic complaint is that the census was conducted in a *manner* that will inevitably result in an undercount. . . . " (emphasis added)), yet rejected the defendants' invocation of the political question doctrine, *see id.* at 838.

Relying on *Steel Company*, Defendants try to dismiss the analysis in *Carey* on the ground that it was so "scant . . . as to constitute the type of 'drive-by jurisdictional ruling[]' that 'ha[s] no precedential effect.'" (Defs.' Br. 26 n.14 (alterations in original) (quoting *Steel Co.*, 523 U.S. at 91)). But Defendants' reliance on *Steel Company* is badly misplaced, as that decision (and the quoted passage in particular) was concerned with courts' "mischaracteriz[ing] claim-processing rules or elements of a cause of action as jurisdictional limitations." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010); *see also Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006) (describing *Steel Co.*'s reference to "drive-by jurisdictional rulings" as concerning opinions where the court states that it "is dismissing 'for lack of jurisdiction' when some threshold fact has not been established"). The Second Circuit did no such thing in *Carey*: Rather than dismissing a case on non-jurisdictional grounds while calling them jurisdictional, the Court *rejected* the defendants' argument for dismissal on a

ground that plainly is jurisdictional in nature. *See* 637 F.2d at 838. Defendants also contend that *Carey* is distinguishable because it concerned "*procedures* put in place to conduct the actual count—not the form of the questionnaire itself." (Defs.' Br. 26 n.14). But the political question doctrine does not operate at that level of specificity. *Carey* stands for the proposition that the "manner" in which the political branches conduct the census is not immune from judicial review. That alone compels rejection of Defendants' political-question arguments.

More broadly, the distinction upon which Defendants' argument rests—between "enumeration" cases and "manner" cases—is ultimately a false one. Defendants try to explain away the Supreme Court's repeated review of how the Secretary has conducted the census on the ground that its cases "[a]ll have concerned calculation methodologies, not pre-count information-gathering functions or content determinations." (Defs.' Br. 25 (citing cases)). But—Defendants' *ipse dixit* aside—challenges to "calculation methodologies," whether they be to "hot-deck imputation" (a process whereby the Census Bureau fills in certain missing information about an address by relying on other information in the Bureau's possession), *Evans*, 536 U.S. at 457-58; statistical sampling, *see U.S. House of Representatives*, 525 U.S. at 322-27; the use of post-enumeration surveys, *see Wisconsin*, 517 U.S. at 8-11; or the methods used to count federal employees serving overseas, *see Franklin*, 505 U.S. at 792-95, are no less challenges to the "manner" in which the "enumeration" is conducted than are the challenges in the present cases. In fact, *every* challenge to the conduct of the census is, in some sense, a challenge to the "manner" in which the gov-

ernment conducts the "actual Enumeration." And these cases are no different. At bottom, Plaintiffs' claim under the Enumeration Clause is that Defendants plan to conduct the census in a manner that does not satisfy the constitutional command to conduct an "actual Enumeration." (*See* SAC ¶¶ 178-82 (claiming that adding the citizenship question will "cause an undercount that impedes the 'actual Enumeration' required by the Constitution"); NGO Compl. ¶ 206 (alleging that adding the "citizenship question will in fact harm the accomplishment of an actual enumeration of the population")). That may or may not be the case, but "the political question doctrine does not place" the matter "outside the proper domain of the Judiciary." *Montana*, 503 U.S. at 459.

Defendants are on even shakier ground to the extent that they invoke the political question doctrine to seek dismissal of NGO Plaintiffs' equal protection claim. (Defs.' NGO Br. 15). Defendants do not specifically argue that the political question doctrine should bar that claim; instead, they merely incorporate the arguments they make in connection with Government Plaintiffs' claims by reference. Regardless, any such arguments would be fruitless, as the Supreme Court made plain in *Baker v. Carr*, 369 U.S. 186 (1962), that "[j]udicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action." *Id.* at 226. Additionally, courts in this Circuit have noted more broadly that "[i]f a litigant claims that an individual right has been invaded, the lawsuit by definition does not involve a

political question." *Stokes v. City of Mount Vernon*, No. 11-CV-7675 (VB), 2015 WL 4710259, at *5 (S.D.N.Y. Aug. 4, 2015) (citing authorities); *In re "Agent Orange" Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 67 (E.D.N.Y. 2005) (same), *aff'd sub nom. Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008). Finally, courts have entertained equal protection challenges to the census before, with no suggestion that doing so would run afoul of the political question doctrine. *See Morales*, 116 F. Supp. 2d 801; *Prieto*, 321 F. Supp. 420.

In short, Defendants' sweeping argument that the federal courts have no role to play in adjudicating the parties' disputes in these cases is squarely foreclosed by precedent. To be sure, the Constitution "vests Congress with wide discretion over . . . the conduct of the census." *Wisconsin*, 517 U.S. at 15. And Congress has, in turn, delegated broad authority to the Secretary. *See id.* at 19 (citing 13 U.S.C. § 141(a)). As discussed below, that undoubtedly mandates substantial "deference" to the decisions of the political branches in the conduct of the census. *See id.* at 23. But it does not follow that the Constitution commits the issue solely to the political branches or (as the discussion of the Enumeration Clause below makes clear) that the textual command for an "actual Enumeration," combined with the historical practice, does not yield "judicially discoverable and manageable standards for resolving" the parties' dispute. *Zivotofsky*, 566 U.S. at 195; *see Evans*, 536 U.S. at 474-79 (looking to history in assessing an Enumeration Clause claim); *Wisconsin*, 517 U.S. at 21 (same); *Franklin*, 505 U.S. at 803-06 (same); *see also, e.g.*, *Nixon v. United States*, 506 U.S. 224, 233-36 (1993) (looking to the history of the Im-

peachment Trial Clause in deciding whether the political question doctrine applied); *Powell v. McCormack*, 395 U.S. 486, 520-48 (1969) (similar). The need for judicial deference does not justify judicial abdication.

C. The Administrative Procedure Act

Defendants' third argument is specific to Plaintiffs' APA claims. (Defs.' Br. 26-30). The "generous review provisions" of the APA provide for judicial review of "'final agency action for which there is no other adequate remedy in a court.'" *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967) (quoting 5 U.S.C. § 704). More specifically, the APA authorizes a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary [or] capricious," "contrary to constitutional right," "in excess of statutory jurisdiction," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D). The "presumption favoring judicial review of administrative action" under these provisions is "strong," but it is "not absolute." *Salazar v. King*, 822 F.3d 61, 75-76 (2d Cir. 2016); *accord Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015). As relevant here, it is subject to a "very narrow exception," codified in Section 701(a)(2) of the APA, for "agency action" that "is committed to agency discretion by law." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971).

Pursuant to Section 701(a)(2), "'review is not to be had' in those rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (quoting *Heckler v. Chaney*, 470 U.S. 821, 830 (1985)); *accord Webster v. Doe*, 486 U.S. 592,

599-600 (1988). The bar is even higher when, as here, a plaintiff brings a constitutional challenge to final agency action: In such a case, a defendant must produce clear and convincing evidence that Congress intended not only to bar judicial review generally, but that Congress also intended to bar judicial review of constitutional challenges specifically. *See Webster*, 486 U.S. at 603 ("We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."); *see also Weinberger v. Salfi*, 422 U.S. 749, 762 (1975). To determine if a statute falls within Section 701(a)(2)'s narrow exception to judicial review, a court must analyze "the specific statutory provisions involved." *Briscoe v. Bell*, 432 U.S. 404, 413-14 (1977). More broadly, "courts look to the statutory text, the agency's regulations, and informal agency guidance that govern the agency's challenged action." *Salazar*, 822 F.3d at 76. As the Second Circuit has explained, "[a]gency regulations and guidance can provide a court with law to apply because . . . where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* (internal quotation marks omitted).

Defendants contend that this is one of the rare circumstances in which Congress clearly intended to preclude judicial review of agency action. (Defs.' Br. 26-30). They base that contention primarily on the language of the Census Act, which—as amended in 1976—provides that the Secretary "shall . . . every 10 years . . . take a decennial census of population

. . . *in such form and content as he may determine*, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a) (emphasis added). Further, the Act "authorize[s]" the Secretary when conducting the decennial census "to obtain such other census information *as necessary*." *Id.* (emphasis added). "This plain language," Defendants contend, "confers discretion as broad as that granted by the statute at issue in *Webster*, which allowed the CIA Director to terminate an employee whenever he 'shall deem such termination necessary or advisable in the interests of the United States.'" (Defs.' Br. 27 (citation omitted)). "The language of § 141(a)," they continue, "contains similar 'deeming' language—the census is to be conducted as the Secretary 'may determine.' And, just as the CIA Director's decision that terminating an employee is 'necessary or advisable' is immune from judicial review, so too is the Secretary's decision to collect information through the decennial census 'as necessary' and 'in such form and content as he may determine.'" (*Id.* at 27-28).

This argument falls short for at least four independent reasons. First, as with Defendants' standing and political question doctrine arguments, it is foreclosed by *Carey*, in which the "Second Circuit explicitly rejected the contention that a federal court is precluded by operation of § 701(a)(2) from reviewing the Secretary's action." *City of N.Y. v. U.S. Dep't of Commerce*, 713 F. Supp. 48, 53 (E.D.N.Y. 1989) (citing *Carey*, 637 F.2d at 838-39). The *Carey* Court held that "allegations as to mismanagement of the census . . . . [are] not one of those 'rare instances' where [the committed-to-agency-discretion-by-law] exception may be invoked." 637 F.2d at 838 (quoting *Overton*

Park, 401 U.S. at 410). The Court noted that the plaintiffs in that case "allege[d] an impairment of their right to vote free of arbitrary impairment, a matter which cannot, of course, be foreclosed by operation of the [APA]." *Id.* (internal quotation marks omitted). Here, too, Plaintiffs claim that the Secretary's decision to include a citizenship question "may systemically dilute the voting power of persons living in communities with immigrant populations, and impair their right to equal representation in congressional, state, and local legislative districts." (SAC ¶ 157; *see also id.* ¶ 101 ("A person-by-person citizenship demand that leads to a systematic undercount of minority populations across the United States will impair fair representation of those groups and the states in which they live."); NGO Compl. ¶ 5 ("[R]educed census participation by members of immigrant communities of color will result in these communities losing government funding as well as political power and representation in the United States Congress, the Electoral College, and state legislatures.")).[16] By itself, *Carey* compels the rejection of Defendants' argument.

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[16] The plaintiffs in *Carey* included several individual voters who alleged that that their votes would be diluted "vis-a-vis those of other residents of the state." 637 F.2d at 836. Here, Government Plaintiffs do not include individual voters, but rather various states, cities, and counties alleging that a census undercount "will impair the right to equal representation." (SAC ¶ 155). But this is no basis upon which to distinguish *Carey*, because that decision also held that "the State of New York has standing in its capacity as *parens patriae*." 637 F.2d at 838 (citing *Missouri v. Illinois*, 180 U.S. 208, 241 (1901)). Moreover, NGO Plaintiffs include groups representing individual voters, and the Complaint alleges that they will suffer "reduce[d]

Second, Defendants' argument is flawed because, in contrast to the statute at issue in *Webster*, the language of the Census Act as a whole does not "fairly exude[] deference" to the agency. 486 U.S. at 600. Defendants' argument focuses myopically on the phrase "in such form and content as he may determine" in Section 141(a), but that phrase is nestled in a clause that uses the word "shall" to curtail the Secretary's discretion: "The Secretary *shall* . . . take a decennial census of population . . . in such form and content as he may determine. . . . " 13 U.S.C. § 141(a) (emphasis added). As the Seventh Circuit explained in a like case, where a statute begins with a mandatory clause ("[t]he Secretary *shall provide* . . . ") and contains a discretionary clause ("as the Secretary *deems appropriate*"), the statute is "unfortunately ambiguous," and a court should look to the structure of the act as a whole to determine whether Congress intended to preclude review. *Bd. of Trs. of Knox Cty. (Ind.) Hosp. v. Sullivan*, 965 F.2d 558, 562 (7th Cir. 1992). In that case, the Seventh Circuit examined the Medicare Act as a whole, concluding that it "imposes a number of mandatory duties upon the [agency]." *Id.* at 563; *see also Bennett*, 520 U.S. at 175 (examining "the statutory scheme" to determine whether Congress intended to commit action to agency discretion by law).

So too here, the Census Act imposes any number of mandatory duties upon the Secretary. *See, e.g.*, 13 U.S.C. § 5 ("The Secretary shall prepare questionnaires, and shall determine the inquiries . . . provided for in this title."); *id.* § 141(a) ("The secretary shall . . . take a

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. . . political representation" in Congress and state legislatures. (NGO Compl. ¶ 146).

decennial census. . . . "); *id.* § 141(b) ("The tabulation . . . shall be completed within 9 months. . . . "); *id.* § 141(c) ("[The Secretary] shall furnish [the census plan] to such officers or public bodies not later than April 1 of the fourth year preceding the decennial census date."). That is strong evidence that Congress did not intend to preclude judicial review of the Secretary's actions. *See Salazar*, 822 F.3d at 77 ("This mandatory, non-discretionary language creates boundaries and requirements for agency action and shows that Congress has not left the decision [at issue] to the discretion of the agency."). At a minimum, it demands even clearer evidence that Congress intended to shield the Secretary's actions from judicial review. The single use of the word "may" is not enough. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401 (D.C. Cir. 1995) ("When a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show *deference* to the agency's determination. However, such language does not mean the matter is *committed* exclusively to agency discretion.").

Third, and relatedly, Defendants' argument fails substantially for the reasons set forth in Justice Stevens's persuasive concurring opinion in *Franklin*, which was joined by three other Justices. *See* 505 U.S. at 816-20 (Stevens, J., concurring in part and concurring in the judgment.[17] As he explained, Defendants' assertion

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[17] The other five Justices in *Franklin* concluded that the action at issue did not constitute "final agency action." *See* 505 U.S. at 796-801. Accordingly, they held that it was not reviewable under the APA for *that* reason and did not reach the question of whether

that the discretion afforded by the Census Act "is at least as broad as that allowed the Director of Central Intelligence" in the statute at issue in *Webster* "cannot withstand scrutiny" for several reasons. *Id.* at 817. First and foremost, "[n]o language equivalent to 'deem . . . advisable' exists in the census statute. There is no indication that Congress intended the Secretary's own mental processes, rather than other more objective factors, to provide the standard for gauging the Secretary's exercise of discretion." *Id.* (ellipsis in original). Second, "it is difficult to imagine two statutory schemes more dissimilar than the National Security Act and the Census Act." *Id.* at 817-18. The former governs "the operations of a secret intelligence agency" and involves national security, where the mandate for judicial deference is at its strongest. *See id.* at 818 & n.17. By contrast, "[t]he reviewability of decisions relating to the conduct of the census bolsters public confidence in the integrity of the process and helps strengthen this mainstay of our democracy." *Id.* at 818 & n.18. Third, and "[m]ore generally," the Supreme Court "has limited the exception" set forth in Section 701(a)(2) to "areas in which courts have long been hesitant to intrude," such as "cases involving national security" or "those seeking review of refusal to pursue enforcement actions." *Id.* at 818 (citing *Webster*, 486 U.S. 592, and *Heckler*, 470 U.S. 821); *see also Lincoln*, 508 U.S. at 191-92 (identifying "categories of administrative decisions that courts traditionally have regarded as 'committed to agency discretion'"). "The taking of the census is not such an area of traditional

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the conduct of the census is "committed to agency discretion by law."

deference." *Franklin*, 505 U.S. at 819 (Stevens, J., concurring in part and concurring in the judgment).[18]

Finally, as Justice Stevens and many other courts have made clear, there are in fact judicially manageable standards with which courts can review the Secretary's decisions. *See id.* at 819-20 & n.19 (citing cases); *City of Philadelphia*, 503 F. Supp. at 677-79; *Utah v.*

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[18] The Court departs from Justice Stevens's concurrence in one narrow respect, although it ultimately does not matter for purposes of this case. Assessing the legislative history of the 1976 statute amending the Census Act to include the language "in such form and content as he may determine," Justice Stevens concluded that "[t]he legislative history [of that statute] evidences no intention to expand the scope of the Secretary's discretion." *Franklin*, 505 U.S. at 816 n.16 (Stevens, J., concurring in part and concurring in the judgment). But the 1976 statute replaced a version of Section 141(a) requiring the Secretary to "take a census of population, *unemployment, and housing (including utilities and equipment)*." *See* H.R. Rep. No. 92-1288, at 23 (emphasis added) (comparing the old statutory language and the proposed amended language). Moreover, the House Committee on Post Office and Civil Service explained that the purpose of replacing "unemployment, and housing (including utilities and equipment)" with the present language —"in such form and content as he may determine"—was "not intended to deny to the Secretary the authority to ask questions on [unemployment and housing] in the decennial censuses. Rather it is directed towards permitting the Secretary *greater discretion* in the determination of the extent to which questions on unemployment and housing are to be included." *Id.* at 12 (emphasis added). Thus, the legislative history could be read to suggest that Congress sought to expand the scope of the Secretary's discretion. That said, the legislative history cannot be read to mean that Congress "intended to effect a new, unreviewable commitment to agency discretion," particularly given the language and structure of the Act itself. *Franklin*, 505 U.S. at 816 n.16 (Stevens, J., concurring in part and concurring in the judgment).

Evans, 182 F. Supp. 2d 1165, 1178-80 (D. Utah 2001) (three-judge court), *aff'd*, 536 U.S. 452; *Willacoochee v. Baldrige*, 556 F. Supp. 551, 555 (S.D. Ga. 1983); *Texas*, 783 F. Supp. at 311-12. *But see Tucker*, 958 F.2d at 1417-18 ("So nondirective are the relevant statutes that it is arguable that there is no law for a court to apply in a case like this—that you might as well turn it over to a panel of statisticians and political scientists and let them make the decision, for all that a court could do to add to its rationality or fairness." (citations omitted)). That is, "the overall statutory scheme and the Census Bureau's consistently followed policy provide[] law to apply in reviewing the Secretary's exercise of discretion." *Franklin*, 505 U.S. at 819 (Stevens, J., concurring in part and concurring in the judgment). For instance, "the relationship of the census provision contained in 13 U.S.C. § 141 and the apportionment provision contained in 2 U.S.C. § 2a demonstrates that the Secretary's discretion is constrained by the requirement that she produce a tabulation of the 'whole number of persons in each State.'" *Id.* (quoting 2 U.S.C. § 2a(a)).

Additionally, the "statutory command . . . embodies a duty to conduct a census that is accurate and that fairly accounts for the crucial representational rights that depend on the census and the apportionment." *Id.* at 819-20; *see also Willacoochee*, 556 F. Supp. at 555 ("Necessarily implicit in the Census Act is the command that the census be accurate. . . . At the very least, the Census Act requires that the defendants' decisions not be arbitrary or capricious."). The Census Bureau's own regulations may also provide law to apply. *See* 15 C.F.R. § 90.2 ("It is the policy of the Census Bureau to provide the most accurate population estimates possible given the constraints of time, mon-

ey, and available statistical techniques . . . [and] to provide governmental units the opportunity to seek a review and provide additional data to these estimates and to present evidence relating to the accuracy of the estimates.").[19] And, of course, the Secretary is plainly

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[19] As Government Plaintiffs note, (Docket No. 182 ("Pls.' Br."), at 29), "the Census Bureau's own administrative guidance" may also provide a judicially manageable standard against which to measure the Secretary's actions. *See Salazar*, 822 F.3d at 76 (noting that a court may look to "informal agency guidance" to determine if there is law to be applied). Whether the particular administrative guidance identified by Government Plaintiffs can be considered "law to apply," however, is a close call. Internal agency policy statements or guidance create "judicially manageable standards" when they provide "meaningful standards [to] constrain[]" agency discretion. *Id.* at 80; *see also Pearl River Union Free Sch. Dist. v. King*, 214 F. Supp. 3d 241, 257 (S.D.N.Y. 2016) (finding that agency guidance was "law to apply" where it "look[ed] to have create[d] binding norms" (second alteration in original) (internal quotation marks omitted)). The Information Quality Act and Office of Management and Budget protocols, cited by Government Plaintiffs, (Pls.' Br. 28-29), do not "'provide judicially manageable standards' because they vest agencies with *unfettered discretion* to determine 'when correction of information contained in informal agency statements is warranted.'" *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 944 F. Supp. 2d 71, 82 (D.D.C. 2013) (emphasis added) (quoting *Salt Inst. v. Thompson*, 345 F. Supp. 2d 589, 602-03 (E.D. Va. 2004), *aff'd sub nom. on other grounds, Salt Inst. v. Leavitt*, 440 F.3d 156 (4th Cir. 2006)). But the Census Bureau's "Statistical Quality Standards," also cited by Government Plaintiffs, (Pls.' Br. 29-30), may count as "law to apply." For one, the preface to those Standards provides that "[a]ll Census Bureau employees . . . *must comply*" with them. U.S. Census Bureau, *Statistical Quality Standards* ii (July 2013) (emphasis added), https://www.census.gov/content/dam/Census/about/about-the-bureau/policies_and_notices/quality/statistical-quality-standards/Quality_Standards.pdf; *see also Salazar*, 822 F.3d at 77 (concluding that internal agency guidance, under which the agency "*must* consider"

constrained by other provisions of the Constitution—including the Due Process Clause of the Fifth Amendment, which is invoked by NGO Plaintiffs here—in exercising his wide discretion under the Act. In short, "the statutory framework and the long-held administrative tradition provide a judicially administrable standard of review." *Franklin*, 505 U.S. at 820 (Stevens, J., concurring in part and concurring in the judgment); *cf.*, *e.g.*, *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 495-98 (D.C. Cir. 1988) (finding judicially manageable standards in a statutory scheme allowing the Office of Personnel Management to depart from competitive civil service only when "necessary" for "conditions of good administration"). Accordingly, the Court concludes that it has jurisdiction to entertain Plaintiffs' APA claims.

D. The Enumeration Clause

Although all of Plaintiffs' claims are justiciable, that does not mean that they are valid. Defendants do not make other arguments to dismiss Plaintiffs' APA claims at this stage, but they do contend that Plaintiffs failure to state claims under the Constitution. (*See* Defs.' Br. 30-35; Defs.' NGO Br. 16-19). The Court turns, then, to Plaintiffs' claims under the Enumeration Clause, which provides in relevant part that an "actual Enumeration shall be made" every ten years "in such Manner as [Congress] shall by Law direct." U.S. CONST.

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certain factors, provided sufficient law to apply (emphasis added)). They also provide standards that meaningfully constrain Census Bureau discretion. *See, e.g.*, *Statistical Quality Standards* 4 (listing factors to be included in a preliminary survey design for "sample survey and census programs" that the Census Bureau "must . . . develop[]").

art. 1, § 2, cl. 3. Plaintiffs' claims fail, Defendants argue, because "[t]here is no allegation that the Secretary is estimating rather than counting the population, nor any allegation that he has failed to establish procedures for counting every resident of the United States. . . . Moreover, the Secretary's decision to reinstate a citizenship question is consistent with historical practice dating back to the founding era." (Defs.' Br. 30). Plaintiffs counter that the "substantial discretion" of Congress and the Secretary in conducting the census "is not unlimited; it does not include a decision to altogether abandon the pursuit of accuracy or to privilege other, non-constitutional values above it." (Pls.' Br. 32). Relying on language from the Supreme Court's decision in *Wisconsin*, they contend that reinstating the citizenship question violates the Enumeration Clause because it "does not bear 'a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census'" to aid in the apportionment of Representatives. (*Id.* (quoting *Wisconsin*, 517 U.S. at 19-20)).

The Court's analysis of Plaintiffs' claims under the Enumeration Clause is guided by three background considerations. First, the "text" of the Clause itself "vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration.'" *Wisconsin*, 517 U.S. at 19; *see also id.* at 17 (noting that the Clause grants to Congress "broad authority over the census"); *Evans*, 536 U.S. at 474 (stating that the Clause, in providing "that the 'actual Enumeration' shall take place 'in such Manner as' Congress itself 'shall by Law direct,' . . . suggest[s] the breadth of congressional methodological authority, rather than its limitation");

Baldrige v. Shapiro, 455 U.S. 345, 361 (1982) (finding that Congress properly exercised its discretion to preclude disclosure of census data because "Congress is vested by the Constitution with authority to conduct the census 'as they shall by Law direct'"). Indeed, the Supreme Court has noted that "there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides." *Wisconsin*, 517 U.S. at 19. And Congress has fully delegated its "broad authority over the census to the Secretary" through the Census Act. *Id.* (citing 13 U.S.C. § 141(a)). "[T]he wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary" demands a high degree of "judicial deference" to the Secretary's decisions concerning the conduct of the census. *Id.* at 22-23.

Second, as Plaintiffs conceded at oral argument, the inquiry with respect to the Enumeration Clause is an "objective" one. (*See* Oral Arg. Tr. 51). That is, there is nothing in either the text of the Enumeration Clause itself or judicial precedent construing the Clause to suggest that the relevant analysis turns on the subjective intent of either Congress or the Secretary. The Clause calls for an "actual Enumeration," and the census either satisfies that standard or it does not; whether Congress or the Secretary intended to satisfy it is of no moment. Thus, as in other areas where Congress is permitted wide latitude to legislate, if there "are plausible reasons" for the actions of Congress or the Secretary, judicial inquiry under the Enumeration Clause "is at an end. It is, of course, 'constitutionally irrelevant whether this reasoning in fact underlay the legislative decision.' . . . " *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor*,

363 U.S. 603, 612 (1960)). In that regard, Plaintiffs' claims under the Enumeration Clause are critically different from their APA and equal protection claims. The Secretary's intent in reinstating the citizenship question is highly relevant to the question of whether Defendants' conduct violated the APA and the Due Process Clause. *See, e.g., Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 276 (1979) (Equal Protection Clause); *Nat'l Audubon Soc'y. v. Hoffman*, 132 F.3d 7, 14 (2d Cir. 1997) (APA). It is not a relevant consideration under the Enumeration Clause itself.

Third, in interpreting the Enumeration Clause, the Court "put[s] significant weight upon historical practice." *N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (emphasis omitted). As a general matter, the Supreme Court and lower courts have long looked to historical practice to "guide [their] interpretation of an ambiguous constitutional provision." *Id.* at 2594 (Scalia, J., concurring in the judgment) (citing cases); *see generally* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012). Notably, they have done so not only when adjudicating disputes between the political branches, *see Noel Canning*, 134 S. Ct. at 2559; *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring), but also when probing the limits of Congressional authority under Article I, *see, e.g., Golan v. Holder*, 565 U.S. 302, 322-23 (2012) (examining the "unchallenged" actions by Congress in the nineteenth and twentieth centuries to interpret Congress's authority under the Copyright Clause), and the limits of executive authority under Article II, *see, e.g., Schick v. Reed*, 419 U.S. 256, 266 (1974) (relying on the long and "unchallenged" history of presidential pardons in interpreting

the Pardon Clause). More to the point for present purposes, the Supreme Court has stressed "the importance of historical practice" in determining the metes and bounds of the Enumeration Clause itself. *Wisconsin*, 517 U.S. at 21; *see also Franklin*, 505 U.S. at 803-06 (noting the importance of historical experience in conducting the census); *Montana*, 503 U.S. at 447-56 (considering the history of apportionment under Article I, Section 2). It follows that "the longstanding 'practice of the government'" in conducting the census "can inform our determination of 'what the law is'" for purposes of the Enumeration Clause. *Noel Canning*, 134 S. Ct. at 2560 (quoting *McCulloch v. Maryland*, 4 Wheat. 316, 401 (1819), and *Marbury v. Madison*, 1 Cranch 137, 177 (1803)); *see, e.g.*, *Schick*, 419 U.S. at 266 ("[A]s observed by Mr. Justice Holmes: 'If a thing has been practiced for two hundred years by common consent, it will need a strong case' to overturn it." (quoting *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922)); *The Pocket Veto Case*, 279 U.S. 655, 690 (1929) ("[A] practice of at least twenty years duration 'on the part of the executive department, acquiesced in by the legislative department . . . is entitled to great regard in determining the true construction of a constitutional provision the phraseology of which is in any respect of doubtful meaning.'" (citation omitted)).

In light of those considerations, the Court is compelled to conclude that the citizenship question is a permissible—but by no means mandated—exercise of the broad power granted to Congress and, in turn, the Secretary pursuant to the Enumeration Clause of the Constitution. The Court is particularly compelled to reach that conclusion by historical practice, which demonstrates that the census has been consistently

used—since the Founding era—for an end unrelated to the "actual Enumeration" textually contemplated by the Enumeration Clause: to collect data on residents of the United States. For example, the nation's first census, taken in 1790, included information about age and sex, in order to "assess the countries [*sic*] industrial and military potential." MEASURING AMERICA 5; *see* 1790 Census Act § 1, 1 Stat. 101. Over the course of the nineteenth century, the demographic questions on the census expanded to include all manner of questions unrelated to the goal of a simple headcount, from questions about the number of persons "engaged in agriculture, commerce, and manufactures," 1820 Census Act, 3 Stat. at 549; to whether members of a household were "deaf," "dumb," or "blind," 1830 Census Act, 4 Stat. at 383; to the "[p]rofession, occupation, or trade of each male person over 15 years of age," the "value of real estate owned," and whether persons over age twenty could read and write, 1850 Census Act, 9 Stat. at 433; to respondents' marital status, *see Morales*, 116 F. Supp. 2d at 805 ("A question on marital status has been asked in the census since 1880."). Of course, "the mere fact that these inquiries were not challenged at the time does not prove" that they were consistent with the Enumeration Clause, *id.*, but it does confirm that Congress has held the view since the very first census in 1790 that it was proper to use the census for more than a mere headcount.

In fact, the longstanding practice of asking questions about the populace of the United States without a direct relationship to the constitutional goal of an "actual Enumeration" has been blessed by all three branches of the federal government. Until the 1930 census, Congress itself "specified minutely" the "details of the

questions" on the census. U.S. GENERAL ACCOUNTING OFFICE, DECENNIAL CENSUS: OVERVIEW OF HISTORICAL CENSUS ISSUES 22 (1998), *available at* https://www.gao.gov/pdfs/GGD-98-103; *see also, e.g.*, 1820 Census Act, 3 Stat. at 550 (listing inquiries required on the fourth decennial census); 1830 Census Act, 4 Stat. at 389 (listing inquiries required on the fifth decennial census). Since 1930, Congress has delegated more authority to the executive branch, but has continued to play a role in determining what questions must be asked. *See, e.g.*, Act of June 18, 1929, 46 Stat. 21, 22 (1929) (providing that "the fifteenth and subsequent censuses shall be restricted to inquiries relating to population, to agriculture, to irrigation, [etc.]"). The modern Census Act, enacted in 1976, for example, expressly "authorize[s]" the Secretary to obtain information beyond that necessary for a mere headcount, 13 U.S.C. § 141(a), and provides that he "shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title," *id.* § 5. But even now, Congress retains both oversight and the ultimate word: The Secretary must submit a report to Congress at least two years prior to the census "containing the Secretary's determination of the questions proposed to be included." *Id.* § 141(f)(2); *see also* H.R. Rep. No. 92-1288, 92d Cong., at 3-4 (1972) (explaining that the provisions of the Census Act requiring the Secretary to submit proposed questions to Congress in advance of the census were meant to strengthen Congress's "oversight capacity" by enacting "a more formal review of the questions proposed" and to preserve Congress's traditional role in "reviewing the operational aspects of census and survey[] procedures and

tabulations"). Thus, *both* political branches have long endorsed the understanding that the census may be used to gather data unrelated to the constitutionally mandated "actual Enumeration."

The Supreme Court and lower courts have long and consistently blessed the practice as well. As far back as 1871, for example, the Supreme Court took as a given that Congress could use the census to gather statistical information beyond that required for an "actual Enumeration":

> Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. . . . An[] illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

Legal Tender Cases, 79 U.S. (12 Wall) 457, 535-36 (1870), *abrogated on other grounds by Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). And the Supreme Court has reaffirmed the dual role of the census in more recent cases. In *Baldrige*, for example, the Court acknowledged that while the "initial constitutional purpose" of the census had been to "provide a basis for apportioning representatives among the states in the Congress," it has long "fulfill[ed] many important and valuable functions

for the benefit of the country," including "in the allocation of federal grants to states" and in "provid[ing] important data for Congress and ultimately for the private sector." 455 U.S. at 353 & n.9; *see also Dep't of Commerce*, 525 U.S. at 341 (noting that "the decennial census is not *only used* for apportionment purposes" and that it "now serves as a linchpin of the federal statistical system by collecting data on the characteristics of individuals, households, and housing units throughout the country" (internal quotation marks omitted)).

Admittedly, the Supreme Court has never confronted a direct challenge to the questions posed on the census. But a handful of lower courts, including the Second Circuit and this Court, have—and have universally rejected such challenges as meritless. *See United States v. Rickenbacker*, 309 F.2d 462, 463 (2d Cir. 1962) (Thurgood Marshall, J.); *Morales*, 116 F. Supp. 2d at 803-20; *United States v. Little*, 321 F. Supp. 388, 392 (D. Del. 1971); *United States v. Moriarity*, 106 F. 886, 891 (C.C.S.D.N.Y. 1901); *see also Prieto*, 321 F. Supp. at 421-23 (denying a preliminary injunction based in part on the claim that, because "the standard 'short form' census" did not allow a respondent to identify as "Mexican-American," it would "result in a serious underestimation of what is America's second-largest minority group"); *United States v. Mitchell*, 58 F. 993, 999 (N.D. Ohio 1893) (stating, in *dicta*, that "[c]ertain kinds of information valuable to the public, and useful to the legislative branches of the government as the basis for proper laws, . . . may properly be required from the citizen" on the decennial census). As a judge on this Court put it more than a century ago, the fact that Article I mandates only "a census of the population . . . does not prohibit the gathering of other

statistics, if 'necessary and proper,' for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated." *Moriarity*, 106 F. at 891 (citing *McCulloch*, 4 Wheat. at 416); *accord Morales*, 116 F. Supp. 2d at 809 (citing *Moriarity*, *McCulloch*, and the *Legal Tender Cases* in affirming that the census may be used to conduct more than "a mere headcount").

By itself, the foregoing history makes it difficult to maintain that asking about citizenship on the census would constitute a violation of the Enumeration Clause. Taking that position becomes untenable altogether in light of the undeniable fact that citizenship status has been a subject of the census for most of the last two hundred years. Congress itself first included a question about citizenship on the fourth census, in 1820. *See* MEASURING AMERICA 6 (noting that the 1820 census included questions "to ascertain the number of foreigners not naturalized"); *see* 1820 Census Act, 3 Stat. at 550. And with one exception (in 1840), *every* decennial census thereafter until 1950 asked a question related to citizenship or birthplace in one form or another. *See id.* at 34-71. In 1960, the Secretary ceased asking *all* respondents about citizenship. *See id.* at 73. Notably, however, the 1960 census *did* include a citizenship question for residents of New York and Puerto Rico, and it *did* ask a sample of respondents to provide where they were born, the language they spoke before coming to the United States, and their parents' birthplaces. *See id.* at 72-76; *see also id.* at 124 n.4 (confirming that these questions were asked on a "sample basis generally" and that "[c]itizenship was asked only

in New York and Puerto Rico, where it was a 100-percent item"). From 1970, the first year in which a longer census questionnaire was sent to a segment of the population, to 2000, the last year in which such a long-form questionnaire was used, the subject of citizenship remained on the census, albeit only for some respondents—namely, the one-sixth or so of households that received the "long-form" questionnaire. *See id.* at 78, 91-92. In 2010, when the long-form questionnaire was deemed unnecessary in light of the annual ACS, the census did not ask about citizenship at all. But there is no indication that the decision to drop the question from the 2010 census was made because Congress or the Secretary had come to believe that asking about citizenship was beyond the broad authority granted to Congress and, in turn, the Secretary by the Enumeration Clause.

Thus, for two centuries, there has been a nearly unbroken practice of Congress either expressly including a question concerning citizenship on the census or authorizing (through delegation of its power and its non-intervention) the executive branch to do so. This history is significant for two reasons. First, as noted, the Supreme Court has made clear that "[l]ong settled and established practice" can be given "great weight" in construing constitutional provisions that define the scope of the political branches' powers. *Noel Canning*, 134 S. Ct. at 2559 (internal quotation marks omitted). For nearly two hundred years, all three branches have agreed that the census may be used to collect demographic information unrelated to the goal of an "actual Enumeration," and two of the three branches have explicitly approved the inclusion of questions about citizenship status. That is plainly "long enough to

entitle a practice to 'great weight in a proper interpretation' of the constitutional provision." *Id.* at 2564 (quoting *The Pocket Veto Case*, 279 U.S. at 689). Second, in assessing the meaning of the Enumeration Clause's broad grant of power, there is independent significance to the fact that demographic questions appeared on the very first census and that citizenship appeared on the census as early as 1820, little more than three decades after the Founding. As the Supreme Court explained nearly 150 years ago, "[t]he construction placed upon the constitution by the [earliest acts of Congress], by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight, and when it is remembered that the rights thus established have not been disputed during a period of nearly a century, it is almost conclusive." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884); *see also J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 412 (1928) ("This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions.").

In short, the "virtually unlimited discretion" granted to Congress by the text of the Constitution, *Wisconsin*, 517 U.S. at 19, and the longstanding historical practice of asking demographic questions generally and asking questions about citizenship specifically, compel the conclusion that asking about citizenship status on the census is not an impermissible exercise of the powers granted by the Enumeration Clause to Congress (and delegated by Congress to the Secretary). In arguing

otherwise, Plaintiffs make two principal arguments. First, they rely heavily on *Wisconsin*, in which the Supreme Court rejected a challenge to the Secretary's decision not to apply a post-census statistical adjustment. (Pls.' Br. 32-35). In doing so, the Court stated that, "[i]n light of the Constitution's broad grant of authority to Congress, the Secretary's decision not to adjust [the census] need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." 517 U.S. at 19. Arguing that the sole constitutional purpose of the census is "accuracy in the count," Plaintiffs contend that that standard should be applied here and that reintroduction of a citizenship question is impermissible because it does not bear a "reasonable relationship" to the accomplishment of an actual enumeration. (Pls.' Br. 35). Second, relying on history themselves, Plaintiffs place great weight on the fact that the Census Bureau has not included citizenship on the universal census form since 1950 and, in the years since, has repeatedly reaffirmed that doing so would harm the accuracy of the count. (*Id.* at 32).

Neither argument is persuasive. First, *Wisconsin* cannot be read to suggest, let alone hold, that each and every question on the census must bear a "reasonable relationship" to the goal of an actual enumeration. Doing so would contravene the Supreme Court's own acknowledgement that the census "fulfills many important and valuable functions," including "in the allocation of federal grants to states based on population" and in "provid[ing] important data for Congress and ultimately for the private sector." *Baldrige*, 455 U.S. at 353. And doing so would also fly in the face of the history discussed above, which makes clear that all

three branches have long blessed, and certainly tolerated, the practice of asking sensitive demographic questions on the census. Indeed, taken to its logical conclusion, application of the *Wisconsin* "reasonable relationship" standard to every decision concerning the census would lead to the conclusion that it is unconstitutional to ask *any* demographic question on the census. After all, asking such questions bears no relationship whatsoever to the goal of an accurate headcount. Far from it: Common sense and basic human psychology dictate that including *any* additional questions on the census—particularly questions on sensitive topics such as race, sex, employment, or health—can serve only to reduce response rates, as both the transaction costs of compliance and the likely concerns about intrusiveness increase. *See, e.g.*, *Rickenbacker*, 309 F.2d at 463 (noting that the defendant had refused to answer census questions based on the view that they were an "unnecessary invasion" into his privacy); *Morales*, 116 F. Supp. 2d at 809-12 (similar); *Mitchell*, 58 F. at 999-1000 (similar).[20] Yet, as noted, the census takers have, with the blessing of all three branches, asked such questions of respondents since the very first census in 1790.

To read *Wisconsin* as Plaintiffs suggest would, therefore, lead ineluctably to the conclusion that each and every census—from the Founding through the present

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[20] Data support this common-sense conclusion. In 2000, for instance, the mail-back response rate for the long-form questionnaire was 9.6% lower than the response rate for the short-form. *See* U.S. CENSUS BUREAU, CENSUS 2000 TOPIC REPORT NO. 11: RESPONSE RATES AND BEHAVIOR ANALYSIS 9 (2004), *available at* https://www.census.gov/pred/www/rpts/TR11.pdf.

—has been conducted in violation of the Enumeration Clause. That would, of course, be absurd, and leads the Court to conclude instead that the *Wisconsin* standard applies only to decisions that bear directly on the actual population count. Notably, the Supreme Court's own language supports that limitation, as it held only that "the Secretary's decision *not to adjust*" the census count "need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population." 517 U.S. at 20 (emphasis added). That is, the Court did not purport to announce a standard that would apply to a case such as this one. *Cf. Rickenbacker*, 309 F.2d at 463 (holding, in a criminal prosecution for failure to respond to the census, that the questionnaire did not violate the Fourth Amendment because "[t]he authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively" and the questions at issue "related to important federal concerns . . . and were not unduly broad or sweeping in their scope").

Plaintiffs' second argument—based on the conduct of the Census Bureau since 1960—is also unpersuasive. That history may support the contention that reintroducing the citizenship question is a bad decision—and that, in turn, may be relevant to whether Plaintiffs can establish a violation of the APA or the Due Process Clause, both of which invite examination into the Secretary's bases for making that decision. But nothing in the history of the census, recent or otherwise, plausibly suggests that asking a citizenship question is beyond the scope of Congress's broad *power* under the Enumeration Clause—which is the sole relevant ques-

tion for purposes of Plaintiffs' Enumeration Clause claims. Moreover, Plaintiffs' argument from recent history ignores the fact that citizenship *did* appear on all but one of the censuses since 1960. To be sure, it did so for only a portion of the population, but that fact alone has no constitutional significance. If Congress and the Secretary lack authority under the Enumeration Clause to ask about citizenship on the census, they could not ask about it of anyone, whatever the length of the questionnaire. Conversely, if the Enumeration Clause permits Congress and the Secretary to ask some respondents about citizenship, it follows that the Clause permits them to ask all respondents. It makes no sense to say that Congress's power (and, by extension, the Secretary's) is dependent on the length of the questionnaire or on whether the entire population or only a portion of the population receives a particular questionnaire. Put simply, if the Enumeration Clause allows the Secretary to ask anyone about citizenship status—and historical practice makes clear that it does—then the Clause permits the Secretary to ask everyone about it.

For the foregoing reasons, the Court holds that Plaintiffs do not—and cannot—state a plausible claim that addition of the citizenship question on the 2020 census constitutes a violation of the Enumeration Clause. That does not mean—as Defendants have audaciously argued (*see* Oral Arg. Tr. 48)—that there are no constitutional limits on Congress's and the Secretary's discretion to add questions to the census questionnaire. First, there is "a strong constitutional interest in accuracy," *Evans*, 536 U.S. at 478, and a decision to add questions to the census without the historical pedigree of the citizenship question could conceivably undermine

that interest to a degree that would be constitutionally offensive. The Court need not define the outer limits of Congress's powers under the Enumeration Clause to decide this case, as it suffices to say that the Secretary's decision *here* is "consonant with, though not dictated by, the text and history of the Constitution." *Franklin*, 505 U.S. at 806; *see also Evans*, 536 U.S. at 479 ("[W]e need not decide here the precise methodological limits foreseen by the Census Clause."). But there may well be questions or practices that would be so extreme and unprecedented that they would not be permissible even under the Enumeration Clause.

Second, to say that the Secretary has authority *under the Enumeration Clause* to ask about citizenship on the census is not to say that the particular exercise of that authority here was constitutional or lawful. The Secretary cannot exercise his authority in a manner that would violate individual constitutional rights, such as the right to equal protection of the laws. *Compare, e.g., Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974) (holding that states may disenfranchise felons under Section 2 of the Fourteenth Amendment), *with Hunter v. Underwood*, 471 U.S. 222, 232-33 (1985) (striking down Alabama's felon disenfranchisement law as a violation of the Equal Protection Clause). Nor, under the APA, may he exercise his authority in a manner that would be "arbitrary" and "capricious." 5 U.S.C. § 706(2)(A); *see, e.g., Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 42 (2d Cir. 2003). Plaintiffs here make both kinds of claims, and the Court's holding that the Secretary's decision was consonant with the Enumeration Clause does not resolve *those* claims.

E. The Equal Protection Claim

Plaintiffs' final claim—pressed only by NGO Plaintiffs—is that Defendants violated the Fifth Amendment by "act[ing] with discriminatory intent toward Latinos, Asian-Americans, Arab-Americans, and immigrant communities of color generally in adding the citizenship question to the Decennial Census." (NGO Compl. ¶ 195). To state a claim under the Fifth Amendment in the circumstances presented here, NGO Plaintiffs have to plausibly allege that Defendants' decision "was motivated by discriminatory animus and its application results in a discriminatory effect." *Hayden v. Cty. of Nassau* ("*Hayden I*"), 180 F.3d 42, 48 (2d Cir. 1999).[21] Their allegations of discriminatory effect—that inclusion of the citizenship question for all respondents will bear, in the form of diminished political representation and reduced federal funding, more heavily on "Latinos, Asian-Americans, Arab-Americans, and other immigrant communities of color" because the non-response rate is likely to be higher in such communities—are sufficient. (NGO Compl. ¶¶ 196-97). Defendants contend that those claims are "speculative," (Defs.' NGO Br. 18), but—assuming the truth of the allegations, as the Court must—Defendants' contention is no more persuasive here than it was in the standing context.

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[21] Although the Equal Protection Clause of the Fourteenth Amendment applies only to the states, the Due Process Clause of the Fifth Amendment prohibits racial discrimination by the federal government as well. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) ("This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.").

Thus, whether Plaintiffs state an equal protection claim turns on whether they plausibly allege a "racially discriminatory intent or purpose." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.* ("*Arlington Heights*"), 429 U.S. 252, 265 (1977); *accord Red Earth LLC v. United States*, 657 F.3d 138, 146 (2d Cir. 2011). Discriminatory intent or purpose "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (citation and footnote omitted). At the same time, "a plaintiff need not prove that the 'challenged action rested solely on racially discriminatory purposes.'" *Hayden v. Paterson* ("*Hayden II*"), 594 F.3d 150, 163 (2d Cir. 2010) (quoting *Arlington Heights*, 429 U.S. at 265); *see also, e.g.*, *United States v. City of Yonkers*, 96 F.3d 600, 611 (2d Cir. 1996) (stating that a plaintiff "need not show . . . that a government decisionmaker was motivated solely, primarily, or even predominantly by concerns that were racial"). Indeed, "[r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." *Arlington Heights*, 429 U.S. at 265. Thus, it is enough to show that an "invidious discriminatory purpose was *a* motivating factor" in the challenged decision. *Id.* at 266 (emphasis added). Further, "[b]ecause discriminatory intent is rarely susceptible to direct proof, litigants may make 'a sensitive inquiry into such circumstantial and direct evidence of intent as

may be available.'" *Hayden II*, 594 F.3d at 163 (quoting *Arlington Heights*, 429 U.S. at 266).

In *Arlington Heights*, the Supreme Court identified a set of non-exhaustive factors for courts to consider in undertaking this "sensitive inquiry" into discriminatory intent. First, whether the impact of the action "'bears more heavily on one race than another' may provide an important starting point." *Arlington Heights*, 429 U.S. at 266 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). Unless a "clear pattern, unexplainable on grounds other than race, emerges," however, "impact alone is not determinative, and the Court must look to other evidence." *Id.* (footnote omitted). That "other evidence" includes: (1) "[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes"; (2) "[t]he specific sequence of events leading up the challenged decision"; (3) "[d]epartures from the normal procedural sequence"; (4) "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached"; and (5) "[t]he legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-68. "In some extraordinary instances," evidence of discriminatory animus may also come from the testimony of decisionmakers. *Id.* at 268.

Considering those factors here, the Court concludes that NGO Plaintiffs' allegations are sufficient to survive Defendants' motion to dismiss. First, the Complaint pleads facts that show "[d]epartures from the normal procedural sequence." *Arlington Heights*, 429 U.S. at

267. These departures include overruling career staff who strongly objected to including the citizenship question, failing to extensively test reintroduction of the question, and ignoring the recommendation of the Census Bureau's advisory committee. (NGO Compl. ¶¶ 7, 191). The Administrative Record—of which the Court may take judicial notice, *see Marshall Cty. Health Care Auth. v. Shalala*, 988 F.2d 1221, 1226 (D.C. Cir. 1993)—lends support to these allegations. It shows, for example, that Secretary Ross overruled Census Bureau career staff, who had concluded that reinstating the citizenship question would be "very costly" and "harm[] the quality of the census count." (*See* Admin. Record 1277). It also confirms that Defendants made the decision to add the question without the lengthy consideration and testing that usually precede even minor changes to the census questionnaire; in fact, it was added without any testing at all. (*See* Ross Mem. 2, 7). Notably, Defendants challenge only one of these alleged aberrations—the failure to test the question, which they attribute to the fact that it had previously been included on the ACS. (Defs.' NGO Br. 19). Whatever its merits, however, that challenge is premature, as all inferences must be drawn in Plaintiffs' favor at this stage of the litigation. *See, e.g.*, *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994). And, in any event, Defendants do not address, let alone dispute, the other procedural irregularities.

Second, various considerations—including the "specific sequence of events leading up to the challenged decision," *Arlington Heights*, 429 U.S. at 267—suggest that Secretary Ross's sole proffered rationale for the decision, that the citizenship question is necessary for litigation of Voting Rights Act claims, may have been

pretextual. For one thing, there is no indication in the record that the Department of Justice and civil rights groups have ever, in the fifty-three years since the Voting Rights Act was enacted, suggested that citizenship data collected as part of the decennial census would be helpful, let alone necessary, to litigate such claims. (*See* Docket No. 187-1, at 14; *see also* NGO Compl. ¶¶ 183, 186). For another, while Secretary Ross initially (and repeatedly) suggested that the Department of Justice's request triggered his consideration of the issue, it now appears that the sequence of events was exactly opposite. In his memorandum, Secretary Ross stated that he "*set out* to take a hard look" at adding the citizenship question "*[f]ollowing receipt*" of a request from the Department of Justice on December 12, 2017. (*See* Ross Mem. 1 (emphases added)).[22] Yet in a June 21, 2018 supplement to the Administrative Record, Secretary Ross admitted that *he* "began considering" whether to add the citizenship question "[s]oon after" his appointment as Secretary in February 2017 —almost ten months before the "request" from DOJ— and that, "[a]s part of that deliberative process," *he and his staff* asked the Department of Justice if it "would support, *and if so would request*, inclusion of a

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[22] In sworn testimony shortly after his March 26, 2018 memorandum —of which the Court can also take judicial notice, *see, e.g.*, *Ault v. J.M. Smucker Co.*, No. 13-CV-3409 (PAC), 2014 WL 1998235, at *2 (S.D.N.Y. May 15, 2014)—Secretary Ross was even more explicit, stating that it was the Department of Justice that had "*initiated* the request for inclusion of the citizenship question." *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel & Aluminum: Hearing Before the H. Ways & Means Comm.*, 115th Cong. 24 (Mar. 22, 2018) (testimony of Secretary Ross) (emphasis added), *available at* 2018 WLNR 8951469.

citizenship question." (Docket No. 189-1 (emphasis added)). Along similar lines, in a May 2, 2017 e-mail to Secretary Ross, the director of the Commerce Department's office of policy and strategic planning stated that "[w]e need to work with Justice *to get them to request* that citizenship be added back as a census question." (Docket No. 212, at 3710 (emphasis added); *see also id.* at 3699 (e-mail from Secretary Ross, earlier the same day, stating that he was "mystified why nothing have [sic] been done in response to my months old request that we include the citizenship question")).[23]

To prove a violation of the Fifth Amendment, of course, NGO Plaintiffs need to prove that Defendants acted with a discriminatory purpose, and evidence that Secretary Ross's rationale was pretextual does not necessarily mean that it was a pretext for discrimination.[24] Nevertheless, "[p]roof that the defendant's explanation is unworthy of credence is . . . one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 147 (2000) (discussing Title VII of the Civil Rights Act of 1964); *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 517 (1993) (stating, in reference to a Title VII claim, that "proving the [defendant's] reason false

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[23] Docket No. 212 is Defendants' notice of the filing of supplemental materials. Given the volume of those materials, Defendants did not file them directly on the docket, but made them available at http://www.osec.doc.gov/opog/FOIA/Documents/CensusProd001.zip.

[24] While evidence of pretext alone does not suffice to prove a violation of the Fifth Amendment, it may well suffice to prove a violation of the APA—as Defendants themselves conceded at the initial conference in 18-CV-2921. (*See* Docket No. 150, at 15).

becomes part of (and often considerably assists) the greater enterprise of proving that the real reason was intentional discrimination"). Thus, "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the [defendant] is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Reeves*, 530 U.S. at 147. At a minimum, there is certainly much "about the sequence of events leading up to the decision" at issue in these cases "that would spark suspicion." *Arlington Heights*, 429 U.S. at 269.[25]

Finally, NGO Plaintiffs identify "contemporary statements" by alleged decisionmakers that lend further support to their claim that Defendants' decision was motivated at least in part by intentional discrimination against immigrant communities of color. *Arlington Heights*, 429 U.S. at 268. Most notably, NGO Plaintiffs identify several statements made by President Trump himself in the months before and after Secretary Ross announced his decision that, while not pertaining directly to that decision, could be construed to reveal a general animus toward immigrants of color. Those statements include (1) his alleged complaint on January 11, 2018, about "these people from shithole countries" coming to the United States, (NGO Compl. ¶ 109); (2) his assertion in February 2018 that certain

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[25] Citing much of the foregoing evidence of pretext, the Court previously ruled, in an oral opinion, that Plaintiffs were entitled to discovery on their claims under the APA. (*See* Oral Arg. Tr. at 76-89).

immigrants "turn out to be horrendous. . . . They're not giving us their best people, folks," (*id.*); and (3) his comment on May 16, 2018, that "[w]e have people coming into the country, or trying to come in. . . . You wouldn't believe how bad these people are. These aren't people, these are animals . . . ," (*id.*).

It is true, as Defendants note, that none of those statements relate specifically to the decision to reinstate the citizenship question on the 2020 census. (Defs.' NGO Br. 18). But the law is clear that the mere "use of racial slurs, epithets, or other racially charged language . . . *can* be evidence that official action was motivated by unlawful discriminatory purposes." *Batalla Vidal v. Nielsen*, 291 F. Supp. 3d 260, 277 (E.D.N.Y. 2018) (emphasis added) (citing cases). It is also true, as Defendants intimate, that the decision-maker here was Secretary Ross—not President Trump himself. (Defs.' NGO Br. 18). But NGO Plaintiffs plausibly claim that President Trump was personally involved in the decision, citing his own reelection campaign's assertion that he "officially mandated" it. (NGO Compl. ¶ 178). Treating those allegations as true, and drawing all reasonable inferences in Plaintiffs' favor, the Court is therefore compelled to conclude that the statements help to nudge NGO Plaintiffs' claim of intentional discrimination across the line from conceivable to plausible. *See Batalla Vidal*, 291 F. Supp. 3d at 279 (relying on "racially charged" statements by the President where he was alleged to have directed the decision at issue in concluding that the plaintiffs' allegations of discriminatory intent were sufficient to survive a motion to dismiss); *cf. Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 49 (2d Cir. 1997) ("[A] decision made in the context of

strong, discriminatory opposition becomes tainted with discriminatory intent even if the decisionmakers personally have no strong views on the matter.").

Finally, Defendants' invocation of the Supreme Court's recent decision in *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), falls somewhere between facile and frivolous. Defendants claim that the decision, which rejected a challenge to President Trump's so-called Travel Ban, "reaffirmed that facially neutral policies are subject to only limited, deferential review and may not lightly be held unconstitutional." (Defs.' NGO Br. 17). In support of that contention, they quote the Court's opinion for the proposition that "deferential review may apply 'across different contexts and constitutional claims.'" (*Id.* at 18 (quoting *Hawaii*, 138 S. Ct. at 2419)). Conspicuously, however, Defendants omit the first part of the quoted sentence, which reveals that the deferential review referenced by the Court in *Hawaii* is that established by *Kleindienst v. Mandel*, 408 U.S. 753 (1972), for challenges to the exclusion of foreign nationals from the country. *See* 138 S. Ct. at 2419. And they fail to acknowledge that every case cited by the Court in which deferential review was applied involved either immigration or the admission of noncitizens. *See id.* at 2419-20; *see also id.* at 2420 n.5 ("[A]s the numerous precedents cited in this section make clear, such a circumscribed inquiry applies to any constitutional claim concerning the entry of foreign nationals."). There is nothing in the Court's opinion to indicate that its deferential review applies outside of the "national security and foreign affairs context," *id.* at 2420 n.5, let alone that the Court meant to unsettle decades of equal protection jurisprudence regarding the types of evidence a court may look to in determin-

ing a government actor's intent. In fact, even with its "circumscribed judicial inquiry," the *Hawaii* Court itself considered "extrinsic evidence"—namely, President Trump's own statements. *See id.* at 2420. If anything, therefore, *Hawaii* cuts against Defendants' arguments rather than in their favor.

In sum, accepting NGO Plaintiffs' allegations as true and drawing all reasonable inferences in their favor—as is required at this stage of the litigation—the Court is compelled to conclude that they state a plausible claim that Defendants' decision to reintroduce the citizenship question on the 2020 census "was motivated by discriminatory animus and its application results in a discriminatory effect." *Hayden I*, 180 F.3d at 48.[26] It follows that Defendants' motion to dismiss NGO Plaintiffs' Fifth Amendment equal protection claim must be and is denied.

CONCLUSION

For the reasons stated above, Defendants' motions to dismiss are GRANTED in part and DENIED in part. *First*, the Court rejects Defendants' attempts to insulate Secretary Ross's decision to reinstate a question about citizenship on the 2020 census from judicial review. Granted, courts must give proper deference to the Secretary, but that does not mean that they lack authority to entertain claims like those pressed here. To the contrary, courts have a critical role to play in

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[26] In light of that conclusion, the Court need not consider NGO Plaintiffs' alternative argument that the inclusion of the citizenship question "was motivated by a 'bare . . . desire to harm a politically unpopular group,' and thus a violation of the equal protection clause even applying rational basis review." (NGO Pls.' Br. 25 (quoting *Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973))).

reviewing the conduct of the political branches to ensure that the census is conducted in a manner consistent with the Constitution and applicable law. *Second*, the Court concludes that Plaintiffs' claims under the Enumeration Clause—which turn on whether Secretary Ross had the *power* to add a question about citizenship to the census and not on whether he *exercised* that power for impermissible reasons—must be dismissed. *Third*, assuming the truth of their allegations and drawing all reasonable inferences in their favor, the Court finds that NGO Plaintiffs plausibly allege that Secretary Ross's decision to reinstate the citizenship question was motivated at least in part by discriminatory animus and will result in a discriminatory effect. Accordingly, their equal protection claim under the Due Process Clause (and Plaintiffs' APA claims, which Defendants did not substantively challenge) may proceed.

None of that is to say that Plaintiffs will ultimately prevail in their challenge to Secretary Ross's decision to reinstate the citizenship question on the 2020 census. As noted, the Enumeration Clause and the Census Act grant him broad authority over the census, and Plaintiffs may not ultimately be able to prove that he exercised that authority in an unlawful manner. Put another way, the question at this stage of the proceedings is not whether the evidence supports Plaintiffs' claims, but rather whether Plaintiffs may proceed with discovery and, ultimately, to summary judgment or trial on their claims. The Court concludes that they may as to their claims under the APA and the Due Process Clause and, to that extent, Defendants' motions are denied.

Per the Court's Order entered on July 5, 2018 (Docket No. 199), the deadline for the completion of fact and expert discovery in these cases is October 12, 2018, and the parties shall appear for a pretrial conference on September 14, 2018. The parties are reminded that, no later than the Thursday prior to the pretrial conference, they are to file on ECF a joint letter addressing certain issues. (*See id.* at 2-3). In that letter, the parties should also give their views with respect to whether the case should resolved by way of summary judgment or trial and whether the two cases should be consolidated for either of those purposes.

The Clerk of Court is directed to terminate 18-CV-2921, Docket No. 154; and 18-CV-5025, Docket No. 38.

SO ORDERED.

Dated: July 26, 2018
New York, New York

/s/ JESSE M. FURMAN
JESSE M. FURMAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

Filed: Sept. 21, 2018

OPINION AND ORDER

FURMAN, JESSE M., United States District Judge:

In these consolidated cases, familiarity with which is assumed, Plaintiffs bring claims under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*, and the Due Process Clause of the Fifth Amendment challenging the decision of Secretary of Commerce Wilbur L. Ross, Jr. to reinstate a question concerning citizenship status on the 2020 census questionnaire. *See generally New York v. U.S. Dep't of Commerce*, 315 F. Supp. 3d 766 (S.D.N.Y. 2018). Now pending is a question that has loomed large since July 3, 2018, when the Court authorized extra-record discovery on the ground that Plaintiffs had "made a strong preliminary or *prima facie* showing that they will find material beyond the Administrative Record indicative of bad faith." (Docket No. 205 ("July 3rd Tr."), at 85). That question, which is the sub-

ject of competing letter briefs, is whether Secretary Ross himself must sit for a deposition. (*See* Docket No. 314 ("Pls.' Letter"); Docket No. 320 ("Defs.' Letter"); Docket No. 325 ("Pls.' Reply")). Applying well-established principles to the unusual facts of these cases, the Court concludes that the question is not a close one: Secretary Ross must sit for a deposition because, among other things, his intent and credibility are directly at issue in these cases.

The Second Circuit established the standards relevant to the present dispute in *Lederman v. New York City Department of Parks & Recreation*, 731 F.3d 199 (2d Cir. 2013). In that case, the Circuit observed that courts had long held "that a high-ranking government official should not—absent exceptional circumstances —be deposed or called to testify regarding the reasons for taking official action, 'including the manner and extent of his study of the record and his consultation with subordinates.'" *Id.* at 203 (quoting *United States v. Morgan*, 313 U.S. 409, 422 (1941)). "High-ranking government officials," the Court explained, "are generally shielded from depositions because they have greater duties and time constraints than other witnesses. If courts did not limit these depositions, such officials would spend an inordinate amount of time tending to pending litigation." *Id.* (internal quotation marks and citation omitted). Joining several other courts of appeals, the Circuit thus held that "to depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition." *Id.* The Court then proffered two *alternative* examples of showings that would satisfy the "exceptional circumstances" standard: "that the official has unique first-hand knowledge related to the litigated claims *or* that the necessary in-

formation cannot be obtained through other, less burdensome or intrusive means." *Id.* (emphasis added).[1]

Those standards compel the conclusion that a deposition of Secretary Ross is appropriate. First, Secretary Ross plainly has "unique first-hand knowledge related to the litigated claims." 731 F.3d at 203. To prevail on their claims under the APA, Plaintiffs must show that Secretary Ross "relied on factors which Congress had not intended [him] to consider, . . . [or] offered an explanation for [his] decision that runs counter to the evidence before the agency." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As Defendants themselves have conceded (*see* Docket No. 150, at 15), one way Plaintiffs can do so is by showing that the stated rationale for Secretary Ross's decision was not his *actual* rationale. Indeed, the Supreme Court has long held that the APA requires an agency decisionmaker to "disclose the basis of its" decision, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962) (internal quotation marks omitted), a requirement that would be for naught if the agency could conceal the *actual* basis for its decision, *see also FTC v. Sperry & Hutchinson Co*, 405 U.S. 233, 248-49 (1972). To prevail on their other claim—under the Due Process clause—Plaintiffs must show that an "invidious

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[1] Defendants argue that where, as here, the high-ranking official in question is a member of the President's Cabinet, the "hurdle is exceptionally high." (Defs.' Letter at 1). That argument, however, finds no support in *Lederman*. In any event, even if an "exceptionally high" standard did apply here, the result would be the same given the Court's findings below.

discriminatory purpose" was a "motivating factor" in Secretary Ross's decision. *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). That analysis "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he specific sequence of events leading up the challenged decision," the "administrative history [including] . . . contemporary statements by members of the decisionmaking body," and even direct testimony from decisionmakers "concerning the purpose of the official action." *Id.* at 266-68. If that evidence establishes that the stated reason for Secretary Ross's decision was not the real one, a reasonable factfinder may be able to infer from that and other evidence that he was "dissembling to cover up a discriminatory purpose." *New York*, 315 F. Supp. 3d at 809 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147 (2000)).

Notably, in litigating earlier discovery disputes, Defendants all but admitted that Plaintiffs' claims turn on the intent of Secretary Ross himself. For instance, in litigating the propriety of Defendants' invocation of the deliberative process privilege, Defendants contended that Plaintiffs should not receive materials prepared by Secretary Ross's subordinates because such materials would not shed light on Plaintiffs' "claims that the ultimate decisionmaker's decision"—that is, *Secretary Ross's* decision—"was based on pretext." (Docket No. 315, at 3). And in seeking to preclude a deposition of the Acting Assistant Attorney General for Civil Rights—the purported ghostwriter of the DOJ letter—Defendants argued vigorously that "[t]he relevant question" in these cases "is whether *Commerce's* stated reasons for reinstating the citizenship question were pretextual."

(Docket No. 255, at 2 (emphasis in original)). As Defendants put it: "*Commerce* was the decision-maker, not DOJ. . . . [T]herefore, *Commerce's* intent is at issue not DOJ's." (*Id.* (emphases added)). In a footnote, Defendants went even further, asserting that "[t]he sole inquiry should be whether *Commerce* actually believed the articulated basis for adopting the policy." (*Id.* at 2 n.1 (emphasis added)). Undoubtedly, Defendants deliberately substituted the word "Commerce" for "Secretary Ross" knowing full well that Plaintiffs' request to depose him was coming down the pike. But given that Secretary Ross himself "was the decision-maker" and that it was he who "articulated" the "basis for adopting the policy," the significance of Defendants' own prior concessions about the centrality of the "decision-maker's" intent cannot be understated.

Indeed, in the unusual circumstances presented here, the concededly relevant inquiry into "Commerce's intent" could not possibly be conducted without the testimony of Secretary Ross himself. Critically, that is not the case merely because Secretary Ross made the decision that Plaintiffs are challenging—indeed, that could justify the deposition of a high-ranking government official in almost every APA case, contrary to the teachings of *Lederman*. Instead, it is the case because Secretary Ross was personally and directly involved in the decision, and the unusual process leading to it, to an unusual degree. *See, e.g., United States v. City of New York*, No. 07-CV-2067 (NGG) (RLM), 2009 WL 2423307, at *2-3 (E.D.N.Y. Aug. 5, 2009) (authorizing the Mayor's deposition where his congressional testimony "suggest[ed] his direct involvement in the events at issue"). By his own admission, Secretary Ross "began considering . . . whether to reinstate a citizen-

ship question" shortly after his appointment in February 2017 and well before December 12, 2017, when the Department of Justice ("DOJ") made a formal request to do so. (Docket No. 189-1). In connection with that early consideration, Secretary Ross consulted with various "other governmental officials"—although precisely with whom and when remains less than crystal clear. (*Id.*; *see also* Docket Nos. 313, 319). Additionally, Secretary Ross manifested an unusually strong personal interest in the matter, demanding to know as early as May 2017—seven months before the DOJ request—why no action had been taken on his "months old request that we include the citizenship question." (Docket No. 212, at 3699).[2] And he personally lobbied the Attorney General to submit the request that he "then later relied on to justify his decision," *New York v. U.S. Dep't of Commerce*, No. 18-CV-2921 (JMF), 2018 WL 4279467, at *4 (S.D.N.Y. Sept. 7, 2018) (*see also* Docket Nos. 314-4, 314-5), and he did so despite being told that DOJ "did not want to raise the question," (Docket No. 325-1). Finally, as the Court has noted elsewhere, *see New York*, 315 F. Supp. 3d at 808, he did all this—and ultimately mandated the addition of the citizenship question—over the strong and continuing opposition of subject-matter experts at the Census Bureau. (*See* Docket No. 325-2, at 5; Docket No. 173, at 1277-85, 1308-12).[3]

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[2] Docket No. 212 is Defendants' notice of the filing of supplemental materials. Given the volume of those materials, Defendants did not file them directly on the docket, but made them available at http://www.osec.doc.gov/opog/FOIA/Documents/CensusProd001.zip.

[3] Docket No. 173 is Defendants' filing of (the first part of) the Administrative Record. Given the volume of those materials, Defend-

The foregoing record is enough to justify the relief Plaintiffs seek, but a deposition is also warranted because Defendants—and Secretary Ross himself—have placed the credibility of Secretary Ross squarely at issue in these cases. In his March 2018 decision memorandum, for example, Secretary Ross stated that he "*set out* to take a hard look" at adding the citizenship question "[*f*]*ollowing receipt*" of the December 2017 request from DOJ. (A.R. 1313 (emphases added)). Additionally, in sworn testimony before the House of Representatives, Secretary Ross claimed that DOJ had "*initiated* the request for inclusion of the citizenship question," *Hearing on Recent Trade Actions, Including Section 232 Determinations on Steel & Aluminum: Hearing Before the H. Ways & Means Comm.*, 115th Cong. 24 (2018), at 2018 WLNR 8951469, and that he was "responding *solely* to the Department of Justice's request," *Hearing on F.Y. 2019 Dep't of Commerce Budget: Hearing Before the Subcomm. on Commerce, Justice, Sci., & Related Agencies of the H. Comm. on Appropriations*, 115th Cong. 9 (2018), at 2018 WLNR 8815056 ("*Mar. 20, 2018 Hearing*") (emphases added). The record developed thus far, however, casts grave doubt on those claims. (*See, e.g.*, Docket No. 189-1 (conceding that Secretary Ross and his staff "inquired whether the Department of Justice . . . would support, *and if so would request*, inclusion of a citizenship question" (emphasis added)); *see* July 3rd Tr. 79-80, 82-83). *See also New York*, 315 F. Supp. 3d at 808-09. Equally significant, Secretary Ross testi-

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ants did not file them directly on the docket, but made them available at http://www.osec.doc.gov/opog/FOIA/Documents/AR%20-%20FINAL%20FILED%20-%20ALL%20DOCS%20[CERTIFICATION-INDEX-DOCUMENTS]%206.8.18.pdf.

fied under oath that he was "not aware" of any discussions between him and "anyone in the White House" regarding the addition of the citizenship question. *Mar. 20, 2018 Hearing* at 21 ("Q: Has the President or anyone in the White House discussed with you or anyone on your team about adding this citizenship question? A: I'm not aware of any such."). But there is now reason to believe that Steve Bannon, then a senior advisor in the White House, was among the "other government officials" whom Secretary Ross consulted about the citizenship question. (*See* Docket Nos. 314-1, 314-3).

In short, it is indisputable—and in other (perhaps less guarded) moments, Defendants themselves have not disputed—that the intent and credibility of Secretary Ross himself are not merely relevant, but central, to Plaintiffs claims in this case. It nearly goes without saying that Plaintiffs cannot meaningfully probe or test, and the Court cannot meaningfully evaluate, Secretary Ross's intent and credibility without granting Plaintiffs an opportunity to confront and cross-examine him. *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."). Indeed, the Supreme Court and the Second Circuit have observed in other contexts that "where motive and intent play leading roles" and "the proof is largely in [Defendants'] hands," as are the case here, it is critical that the relevant witnesses be "present and subject to cross-examination" so "that their credibility and the weight to be given their testimony can be appraised." *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962); *see DiRienzo v. Philip Servs. Corp.*, 294 F.3d 21, 30 (2d Cir. 2002) ("Live testimony is espe-

cially important . . . where the factfinder's evaluation of witnesses' credibility is central to the resolution of the issues."); *cf. Goldberg*, 397 U.S. at 269 ("[W]here credibility and veracity are at issue, . . . written submissions are a wholly unsatisfactory basis for decision.").

Separate and apart from that, Plaintiffs have demonstrated that taking a deposition of Secretary Ross may be the only way to fill in critical blanks in the current record. Notably, Secretary Ross's three closest and most senior advisors who advised on the citizenship question—his Chief of Staff, the Acting Deputy Secretary, and the Policy Director/Deputy Chief of Staff—testified repeatedly that Secretary Ross was the only person who could provide certain information central to Plaintiffs claims. (*See, e.g.*, Pls.' Letter, Ex. 6, at 85 ("You would have to ask [Secretary Ross]."), 101 (same), 209 (same), 210 (same); *id.* Ex. 8, at 111-13 (same)). Among other things, no witness has been able to—or presumably could—testify to the substance and details of Secretary Ross's early conversations regarding the citizenship question with the Attorney General or with interested third parties such as Kansas Secretary of State Kris Kobach. (*See* Pls.' Letter, Ex. 6, at 82-86, 119-20, 167-68; *id.* Ex. 7 at 57-58; *id.* Ex. 8 at 205-07). No witness has been able to identify to whom Secretary Ross was referring when he admitted that "other senior Administration officials . . . raised" the idea of the citizenship question before he began considering it. (*See* Pls.' Letter, Ex. 6 at 101; *id.* Ex. 7 at 71-73; *id.* Ex. 8 at 111-13). And despite an allegedly diligent investigation—including "consultation" of an unknown nature and extent with Secretary Ross himself (Sept. 14, 2018 Conf. Tr. 16)—Defendants have not been able to identify precisely to whom Secretary Ross spoke

about the citizenship question, let alone when, in the critical months before DOJ's December 2017 letter, (*see id.*). At a minimum, Plaintiffs are entitled to make good-faith efforts to refresh Secretary Ross's recollections of these critical facts and to test the credibility of any claimed lack of memory in a deposition. Indeed, there is no other way they could do so.

In sum, for the foregoing reasons, it is plain that "exceptional circumstances" are present here, both because Secretary Ross has "unique first-hand knowledge related to the litigated claims" *and* because "the necessary information cannot be obtained through other, less burdensome or intrusive means." *Lederman*, 731 F.3d at 203. In arguing otherwise, Defendants contend that this Court's review of Secretary Ross's decision must be limited to the administrative record. (Defs.' Letter 2). But that assertion ignores Plaintiffs' due process claim, in which they plausibly allege that an invidious discriminatory purpose was a motivating factor in the challenged decision. *See New York*, 315 F. Supp. 3d at 808-11. Evaluation of that claim requires "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including, in appropriate circumstances, "the testimony of decisionmakers." *Id.* at 807, 808 (internal quotation marks omitted). Defendants' assertion also overlooks that the testimony of decisionmakers can be required even under the APA. In *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), for example, the Supreme Court made clear that the APA requires a "thorough, probing, in-depth review" of agency action, including a "searching and careful" inquiry into the facts. *Id.* at 415-16. And where there is "a strong showing of bad faith or improper behavior," that permits a court to "require the admin-

istrative officials who participated in the decision to give testimony explaining their action." *Id.* As the Court held on July 3rd, that is the case here. (*See* July 3rd Tr. 82-84). "If anything, the basis for that conclusion appears even stronger today." *New York*, 2018 WL 4279467, at *3.

Defendants also contend that the information Plaintiffs seek can be obtained from other sources, such as a Rule 30(b)(6) deposition of the Department of Commerce, interrogatories, or requests for admission. (Defs.' Letter 3). But that contention is unpersuasive for several reasons. First, none of those means are adequate to test or evaluate Secretary Ross's credibility. Second, none allows Plaintiffs the opportunity to try to refresh Secretary Ross's recollection if that proves to be necessary (as seems likely, *see* Sept. 14, 2018 Conf. Tr. 16) or to ask follow-up questions. *See Fish v. Kobach*, 320 F.R.D. 566, 579 (D. Kan. 2017) (authorizing the deposition of a high-ranking official, in lieu of further written discovery, in part because a deposition "has the advantage of allowing for immediate follow-up questions by plaintiffs' counsel"). Third, Plaintiffs have already pursued several of these options, yet gaps in the record remain. (*See* Docket Nos. 313, 319; Sept. 14, 2018 Conf. Tr. 14-16). And finally, to adequately respond to additional interrogatories, prepare a Rule 30(b)(6) witness, or respond to requests for admission, Defendants would have to burden Secretary Ross anyway. "Ordering a deposition at this time is a more efficient means" of resolving Plaintiffs' claims "than burdening the parties and the [Secretary] with further rounds of interrogatories, and, possibly, further court rulings and appeals." *City of New York*, 2009 WL 2423307, at *3.

Two final points warrant emphasis. First, the Court's conclusion that Plaintiffs are entitled to depose Secretary Ross is not quite as unprecedented as Defendants suggest. To be sure, depositions of agency heads are rare—and for good reasons. But courts have not hesitated to take testimony from federal agency heads (whether voluntarily or, if necessary, by order) where, as here, the circumstances warranted them. *See, e.g.*, *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6 & n.1 (D.D.C. 1999) (reaching a decision after a trial at which the Secretary of the Interior testified—shortly after being held in civil contempt for violating the Court's discovery order); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 316 F. Supp. 754, 760 nn.12 & 36 (D.D.C. 1970) (deposition and trial testimony required from the Secretary of Transportation), *rev'd on other grounds sub nom. D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971); *Am. Broad. Cos. v. U.S. Info. Agency*, 599 F. Supp. 765, 768-69 (D.D.C. 1984) (requiring a deposition of the head of the United States Information Agency); *Union Sav. Bank of Patchogue, N.Y. v. Saxon*, 209 F. Supp. 319, 319-20 (D.D.C. 1962) (compelling a deposition of the Comptroller of the Currency); *see also Volpe*, 459 F.2d at 1237-38 (approving of the district court's decision to require the Secretary's testimony).

Courts have also permitted testimony from former agency heads about the reasons for official actions taken while they were still in office. *See, e.g.*, *Starr Int'l Co. v. United States*, 121 Fed. Cl. 428, 431 (2015) (Secretary of the Treasury and Chair of the Federal Reserve), *vacated in part on other grounds*, 856 F.3d 953 (Fed. Cir. 2017); *McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358, 372 (1996) (Secretary of Defense). And, contrary to Defendants' suggestion that authorizing a

deposition of Secretary Ross "would have serious repercussions for the relationship between two coequal branches of government" (Defs.' Letter 1 (internal quotation marks omitted)), the Supreme Court has made clear that "interactions between the Judicial Branch and the Executive, even quite burdensome interactions," do not "necessarily rise to the level of constitutionally forbidden impairment of the Executive's ability to perform its constitutionally mandated functions." *Clinton v. Jones*, 520 U.S. 681, 702 (1997). If separation-of-powers principles do not call for a federal court to refrain from exercising "its traditional Article III jurisdiction" even where exercising that jurisdiction may "significantly burden the time and attention" of *the President*, *see id.* at 703, they surely do not call for refraining from the exercise of this Court's jurisdiction here.[4]

Second, in the final analysis, there is something surprising, if not unsettling, about Defendants' aggressive efforts to shield Secretary Ross from having to answer questions about his conduct in adding the citizenship question to the census questionnaire. At bottom, limitations on depositions of high-ranking officials are rooted in the notion that it would be contrary to the public

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[4] It bears mentioning that Secretary Ross has testified several times on the subject of this litigation before Congress—a co-equal branch not only of the Executive, but also of the Judiciary. (*See* Pls.' Reply 3 n.6). Although congressional testimony, and preparation for the same, undoubtedly impose serious burdens on Executive Branch officials, even high-ranking Executive Branch officials must comply with subpoenas to testify before Congress. *See Comm. on Judiciary, U.S. House of Representatives v. Miers*, 558 F. Supp. 2d 53, 106-07 (D.D.C. 2008). The obligation to give testimony in proceedings pending before an Article III court, where necessary, is of no lesser importance.

interest to allow litigants to interfere too easily with their important duties. *See Lederman*, 731 F.3d at 203. The fair and orderly administration of the census, however, is arguably the Secretary of Commerce's most important duty, and it is critically important that the public have "confidence in the integrity of the process" underlying "this mainstay of our democracy." *Franklin v. Massachusetts*, 505 U.S. 788, 818 (1992) (Stevens, J., concurring in part and concurring in the judgment). In light of that, and the unusual circumstances presented in these cases, the public interest weighs heavily in favor of both transparency and ensuring the development of a comprehensive record to evaluate the propriety of Secretary Ross's decision. In short, the public interest weighs heavily in favor of granting Plaintiffs' application for an order requiring Secretary Ross to sit for a deposition.

That said, mindful of the burdens that a deposition will impose on Secretary Ross and the scope of the existing record (including the fact that Secretary Ross has already testified before Congress about his decision to add the citizenship question), the Court limits the deposition to four hours in length, *see, e.g.*, *Arista Records LLC v. Lime Grp. LLC*, No. 06-CV-5936 (GEL), 2008 WL 1752254, at *1 (S.D.N.Y. Apr. 16, 2008) ("A district court has broad discretion to set the length of depositions appropriate to the circumstances of the case."), and mandates that it be conducted at the Department of Commerce or another location convenient for Secretary Ross. The Court, however, rejects Defendants' contention that the deposition "should be held only after all other discovery is concluded," (Defs.' Letter 3), in no small part because the smaller the window, the harder it will undoubtedly be to schedule

the deposition. Finally, the Court declines Defendants' request to "stay its order for 14 days or until Defendants' anticipated mandamus petition is resolved, whichever is later." (*Id.*). Putting aside the fact that Defendants do not even attempt to establish that the circumstances warranting a stay are present, *see New York*, 2018 WL 4279467, at *1 (discussing the standards for a stay pending a mandamus petition), the October 12, 2018 discovery deadline is rapidly approaching and Defendants themselves have acknowledged that time is of the essence, *see id.* at *3. Moreover, the deposition will not take place immediately; instead, Plaintiffs will need to notice it and counsel will presumably need to confer about scheduling and other logistics. In the meantime, Defendants will have ample time to seek mandamus review and a stay pending such review from the Circuit.

The Clerk of Court is directed to terminate Docket No. 314.

SO ORDERED.

Dated: Sept. 21, 2018
New York, New York

/s/ JESSE M. FURMAN
JESSE M. FURMAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 18-CV-2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

No. 18-CV-5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFF

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

Filed: Aug. 17, 2018

ORDER

FURMAN, JESSE M., United States District Judge:

Two discovery-related letter motions filed by Plaintiffs in these actions remain pending, in whole or in part: one filed on August 10, 2018, seeking an order compelling Defendants to make John Gore, Acting Assistant Attorney General for Civil Rights, available for deposition, (18-CV-2921, Docket No. 236); and another filed on August 13, 2018, seeking an order compelling De-

fendants to produce "materials erroneously withheld" from the Administrative Record, (18-CV-2921, Docket No. 237).[1] Defendants responded in letters dated August 15, 2018. (18-CV-2921, Docket Nos. 250, 255; *see also* 18-CV-2921, Docket Nos. 253-54).

Upon review of the parties' letters and applicable case law, the Court sees no need for a conference at this time. First, the Court grants Plaintiffs' letter motion for an order compelling Defendants to make Acting Assistant Attorney General Gore available for deposition. Given the combination of AAG Gore's apparent role in drafting the Department of Justice's December 12, 2017 letter requesting that a citizenship question be added to the decennial census and the Court's prior rulings—namely, its oral ruling of July 3rd concerning discovery, (18-CV-2921, Docket No. 207), and its Opinion of July 26th concerning Defendants' motions to dismiss (18-CV-2921, Docket No. 215, at 60-68)—his testimony is plainly "relevant," within the broad definition of that term for purposes of discovery. *See, e.g., Alaska Elec. Pension Fund v. Bank of Am. Corp.*, No. 14-CV-7126 (JMF), 2016 WL 6779901, at *2 (S.D.N.Y. Nov. 16, 2016) ("Although not unlimited, relevance, for purposes of discovery, is an extremely broad concept." (internal quotation marks omitted)). Moreover, given Plaintiffs' claim that AAG Gore "ghostwrote DOJ's December 12, 2017 letter requesting addition of the citizenship question," (Docket No. 236, at 1), the Court concludes that AAG Gore possesses relevant information that cannot be obtained from another source. *See Marisol A. v. Giu-*

[1] Plaintiffs' August 13th letter also sought other relief, which the Court addressed in an Order entered on August 14, 2018. (18-CV-2921, Docket No. 241).

liani, No. 95-CV-10533 (RJW), 1998 WL 132810, at *2 (S.D.N.Y. Mar. 23, 1998).

Further, the Court is unpersuaded that compelling AAG Gore to sit for a single deposition would meaningfully "hinder" him "from performing his numerous important duties," let alone "unduly burden" him or the Department of Justice (18-CV-2921, Docket No. 255, at 3), which is the relevant standard under Rule 45 of the Federal Rules of Civil Procedure. *See, e.g.*, *Pisani v. Westchester Cty. Health Care Corp.*, No. 05-CV-7113 (WCC), 2007 WL 107747, at *2 (S.D.N.Y. Jan. 16, 2007) (denying a Rule 45 motion to quash subpoena, but recognizing that "special considerations arise when a party attempts to depose a high level government official"). And finally, any applicable privileges can be protected through objections to particular questions at a deposition; they do not call for precluding a deposition altogether. *See, e.g.*, *In re Application of Chevron Corp.*, 749 F. Supp. 2d 135, 141 (S.D.N.Y. 2010) (denying motion to quash subpoenas and directing parties to make their specific objections during the deposition).

Second, Plaintiffs' request for an order compelling "production of materials erroneously withheld" is denied without prejudice. (18-CV-2921, Docket No. 237). Although the Court previously characterized Plaintiffs' allegations as "troubling" (18-CV-2921, Docket No. 241), it accepts Defendants' representations (backed by declarations from two relevant officials at the Department of Commerce) that they have now "taken all proper and reasonable steps to ensure that the administrative record and supplemental materials are complete," (18-CV-2921, Docket No. 250, at 2). If or when Plaintiffs have reason to believe otherwise, they may renew

their letter motion in accordance with the Court's Individual Rules and Practices for Civil Cases and its Order of July 5th. (18-CV-2921, Docket No. 199). But there is no basis for relief now.

For the foregoing reasons, Plaintiffs' letter motion of August 10th is GRANTED to the extent it seeks an order compelling Defendants to make AAG Gore available for a deposition, and their letter motion of August 13th is DENIED to the extent it seeks an order compelling Defendants to produce "materials erroneously withheld." The Clerk of Court is directed to terminate 18-CV-2921, Docket Nos. 236 and 237, and 18-CV-5025, Docket Nos. 81 and 82.

SO ORDERED.

Dated: Sept. 21, 2018
New York, New York

/s/ JESSE M. FURMAN
JESSE M. FURMAN
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 18 Civ. 2921 (JMF)

STATE OF NEW YORK, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

No. 18 Civ. 5025 (JMF)

NEW YORK IMMIGRATION COALITION, ET AL., PLAINTIFFS

v.

UNITED STATES DEPARTMENT OF COMMERCE, ET AL., DEFENDANTS

New York, N.Y.
July 3, 2018
9:30 a.m.

ARGUMENT

Before: FURMAN, HON. JESSE M., District Judge

APPEARANCES

FOR THE PLAINTIFFS:

NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL
BY: MATTHEW COLANGELO
AJAY P. SAINI
ELENA S. GOLDSTEIN

and

ARNOLD & PORTER KAYE SCHOLER
BY: JOHN A. FREEDMAN

and

LAW OFFICE OF ROLANDO L. RIOS
BY: ROLANDO L. RIOS

FOR THE DEFENDANTS:

UNITED STATES DEPARTMENT OF JUSTICE
CIVIL DIVISION, FEDERAL PROGRAMS BRANCH
BY: BRETT SHUMATE
KATE BAILEY
JEANNETTE VARGAS
STEPHEN EHRLICH

[3] (Case called)

MR. COLANGELO: Good morning, your Honor.

Matthew Colangelo from New York for the state and local government plaintiffs.

One housekeeping matter, your Honor, if I may. The plaintiffs intended to have two lawyers oppose the Justice Department's motion to dismiss; Mr. Saini ar-

gue the standing argue and Ms. Goldstein argue the remaining 12(b)(1) and 12(b)(6) arguments; and then I will argue the discovery aspect of today's proceedings. And I may ask my cocounsel from Hidalgo County, Texas, Mr. Rios, to weigh in briefly on one particular aspect of expert discovery that we intend to proffer. So with the Court's indulgence, we may swap counsel in and out between those arguments.

THE COURT: Understood. Thank you.

MS. GOLDSTEIN: Elena Goldstein also from New York for the plaintiffs.

MR. SAINI: Ajay Saini also from New York for the plaintiffs.

MR. FREEDMAN: Good morning, your Honor.

John Freedman from Arnold & Porter for the New York Immigration Coalition plaintiffs.

MR. RIOS: Rolando Rios for the Cameron and Hidalgo County plaintiffs, your Honor.

MR. SHUMATE: Good morning, your Honor.

[4] Brett Shumate from the Department of Justice on behalf of the United States. I'll be handling the motion to dismiss augment today. My colleague, Ms. Vargas, will be handling the discovery argument.

MS. VARGAS: Good morning, your Honor.

Jeannette Vargas with the U.S. Attorney's Office for the Southern District of New York.

MS. BAILEY: Kate Bailey with the Department of Justice on behalf of the United States.

MR. EHRLICH: Stephen Ehrlich from the Department of Justice on behalf of defendants.

THE COURT: Good morning to everybody.

Just a reminder and request that everybody should speak into the microphones. First of all, the acoustics in this courtroom are a little bit subpar. Second of all we're both on CourtCall so counsel who are not local can listen in and also, I don't know if there are folks in the overflow room, but in order for all of them to hear it's important that everybody speak loudly, clearly, into the microphone.

Before we get to the oral argument a couple housekeeping matters on my end. First, I did talk to judge Seeborg following his conference I think it was last Thursday in the California case. He mentioned that there is some new cases since the initial conference in this matter, perhaps in Maryland. Does somebody want to update me about that and tell [5] me what the status of those cases may be.

MS. BAILEY: There is an additional case that's been filed in Maryland, Lupe v. Ross.

THE COURT: What was the plaintiff's name?

MS. BAILEY: Lupe. L-U-P-E. That case has just been filed and a schedule has not been set yet but it is before Judge Hazel, same as the case that was already filed in Maryland.

THE COURT: And that raises a citizenship question challenge?

MS. BAILEY: Yes, your Honor.

THE COURT: Are there any other cases aside from that?

MS. BAILEY: No, your Honor.

THE COURT: All right. Any objection to my potentially at some point reaching out to Judge Hazel?

MS. BAILEY: No, your Honor.

THE COURT: All right.

I have one minor disclosure, which is that there were a number of amicus briefs filed in this case, one of which was filed on behalf of several or a number of members of Congress, one of whom was Congresswoman Maloney. My 14-year-old daughter happened to intern for her primary campaign for about a week and two days earlier this month. I did consider whether I should either reject the amicus brief or if it would warrant anything beyond that, and I did not—I decidedly did not; [6] that disclosing it would suffice.

I should mention that my high school son is going to be starting as a Senate Page next week. I don't think that's affiliated with any particular senator but since several senators were on that brief as well I figured I'd mention it, but suffice it to say that their responsibilities are commensurate with their ages. Don't tell them I said that. They did not do anything in the census and will not.

All right. Finally, briefing in the New York Immigration Coalition case is obviously continuing. The government filed its brief last Friday. Plaintiffs will be filing their opposition by July 9. And reply is due July 13.

Per my order of the 27th, June 27th that is, and the plaintiffs' letter of June 29, I take it everybody's un-

derstanding is that that briefing is going to focus on arguments and issues specific to that case, and essentially the government has already incorporated by reference its arguments, to the extent they're applicable, from the states case and the plaintiffs will not be responding separately to that.

MR. FREEDMAN: That's correct, your Honor.

THE COURT: And suffice it to say that my ruling in the states case will apply to that case to the extent that there are common issues.

Any other preliminary matters? Otherwise, I'm prepared to jump into oral argument and we'll go from there.

[7] All right. So let's do it then. I think the best way to proceed is I'm inclined to start with standing, then go to—folks should not be using that rear door but I'll let my deputy take care of that.

Start with standing and then I'll hear first from defendants as the moving parties and then plaintiffs can respond. And then I want to take both the political question doctrine and the APA justiciability together. I recognize that there are discrete issues and arguments but, nevertheless, there is some thematic overlap. And then, finally, I want to take up the failure to state a claim under the enumeration clause. Candidly, I want to focus primarily on that. So in that regard I may move you a little quickly through the first preliminary arguments.

So Mr. Shumate, let me start with you and focus on standing in the first instance.

Use this microphone actually.

MR. SHUMATE: Good morning, your Honor. May it please the Court, Brett Shumate for the United States.

Congress directed the Secretary of Commerce to conduct the census in such form and content as he may determine. For the 2020 census, Commerce decided to reinstate the question about citizenship on the census questionnaire. That questionnaire already asks a number of demographic questions about race, Hispanic origin, and sex. As far back as 1820 and [8] as most recently as 2000 Commerce asked a question about citizenship on the census questionnaire.

THE COURT: Let me just make you cut to the chase because I got the preliminaries, I've read the briefs, I'm certainly familiar with the history, I'm familiar with your overall argument.

On the question of standing, let me put it to you bluntly, why is your argument not foreclosed by the Second Circuit's decision in Carey v. Klutznick?

MR. SHUMATE: It's not foreclosed by Carey, your Honor, because the injury in this case, the alleged injury is not fairly traceable to the government. Instead, the injury that's alleged here is the result of the independent action of third parties to make a choice not to respond to the census in violation of a legal duty to do so. That was not at issue in the Carey case. The Carey case is also distinguishable on—

THE COURT: So you make two distinct arguments with respect to standing. The first is that there is no injury in fact; and the second is that there is no traceability.

Is the injury in fact argument foreclosed by Carey v. Klutznick?

MR. SHUMATE: No, it's not, your Honor, for two reasons. Carey was a post-census case. So the injury there was far more concrete than it is here. Here, we're two years out from the census and the injuries that are alleged here are [9] quit speculative. They depend on a number of speculative links in the chain of causation that he we didn't have in Carey v. Klutznick.

First we have to speculate first about why people might not respond to the census. They might not respond for a number of reasons. Paragraphs 47 to 53 of the plaintiffs' complaint point to a number of different reasons: Distress to the government, political climate, a number of different things. But even assuming there is an increase in the—a decrease in the initial response rate, it's speculative whether the Census Bureau's extensive efforts to follow up, what they call nonresponse follow-up operations, will fail.

THE COURT: Can I consider those efforts in deciding this question? Are those in the complaint? Am I not limited to the allegations in the complaint?

It seems to me that you're relying pretty heavily on records and issues outside of the complaint. That may well be appropriate at summary judgment and, as many of the cases you've cited are, in fact, on summary judgment. So why is that appropriate for me to look at and consider at this stage?

MR. SHUMATE: Your Honor, on a 12(b)(1) motion to dismiss the Court can consider evidence outside the pleadings for purposes of establishing its jurisdiction.

Even if you limit the allegations to the complaint, paragraph 53 makes no allegation that the Census Bureau's [10] extensive efforts that they intend to

implement to follow up with individuals who may not respond to the census initially will fail.

And then, finally, the third element of that speculative chain of causation is that it's speculative whether any undercount that results will be material in a way that will ultimately affect the plaintiffs. As they acknowledge, there are very complex formulas to determine apportionment and federal funding. And we just don't know at this point whether any undercount will be sufficient to cause them to have an injury in 2020.

In Carey it was very different. It was in the census year. There were already preliminary estimates that the census figures were inaccurate because the Census Bureau was including or using inaccurate address lists in New York City. So it was—there was a far stronger and tighter causal nexus between the alleged injury and the government's action in that case. And that case also didn't involve a question on the citizenship—a question on the census form.

THE COURT: You seem to reject the substantial risk standard, citing the footnote in Clapper and suggest that it's limited to Food and Drug Administration type cases.

What's your authority for that proposition and don't the cases that are cited in the Clapper footnote stand for the proposition that it's not so limited?

[11] MR. SHUMATE: Your Honor, I think under either standard the plaintiffs' claims will fail. I think the substantial risk test involves—the cases that I have seen it will have involved cases involving risk of Food and Drug enforcement, or cases where there's a risk

that the government may institute prosecution, something like that.

The far more accepted test is certainly impending injury. Either test, the plaintiffs can't show that there's a substantial risk that their injuries will ultimately occur because of these speculative chain of inferences that they have to rely on to tie the addition of a question on a form to their ultimate injury here, which is a loss of federal funding.

THE COURT: Are not they basing that inference on statements of the government itself and former and current government officials?

In other words, the government itself has said that adding a citizenship question will depress response rates. They've alleged in the complaint that there are states and counties and cities that have a high incidence of immigrants and it, therefore, would seem to follow that it would be particularly depressed in those states.

At this stage in the proceedings, doesn't it demand too much to expect them to be able to prove concretely what the actual differential response rate is going to be and what the concrete implications of that are going to be?

[12] MR. SHUMATE: Your Honor, they don't have to prove it concretely. But those allegations that they're pointing to only go to the initial response rate.

There's always been an undercount in the census in terms of the initial response rate. I think in the 2010 census it was 63 percent of the individuals responded to the initial census questioning. So I think that's what the individuals—the Census Bureau are referring to, that there may be a drop in the initial response rate. But there are no allegations that the Census Bureau's

follow-up operations, which are quite extensive, that those will fail. The only allegation that they pointed to, I think it is paragraph 53 of the complaint that says because of the reduced initial response rate, the Census Bureau will have to hire additional enumerators to follow up with those individuals. But it is entirely speculative whether those efforts will fail. It's also speculative, even assuming those efforts fail, whether the undercount will be material in a way that ultimately affects the plaintiffs. Because this is a pre-census case, it's not like Carey where there, like I said earlier, there were already preliminary figures suggesting that the Census Bureau had an inaccurate count in New York City.

THE COURT: Let me ask you about traceability. Why is that argument not foreclosed by the Circuit's decision last Friday in the NRDC v. NHTSA case. I don't know if you've seen it, but the Court held that—rejected an argument by the [13] government that the connection between the potential industry compliance and the agency's imposition of coercive penalties intended to induce compliances too indirect to establish causation and proceeds to say: As the case law recognizes, it is well settled that for standing purposes petitioners need not prove a cause-and-effect relationship with absolute certainty. Substantial likelihood of the alleged commonality meets the test. This is true even in cases where the injury hinges on the reactions of the third parties to the agency's conduct.

MR. SHUMATE: I think the key is the language that you read about coercive effect. There is no coercive effect here by the government. In fact, the government is attempting to coerce people to respond to

the census. There's a statute that requires individuals to respond to the census.

At the most what the plaintiffs have alleged is that the government's addition of the citizenship question will encouraged people not to respond to the census, even though there may be a small segment of the population who would otherwise respond not for—putting aside the citizenship question. This is a lot more like the Simon case from 1976, which involved hospitals—the IRS revenue ruling that granted favorable tax treatment to hospitals. The allegation in that case was that the government's decision was encouraging the hospitals to deny access to indigents to hospital services. And the Court said no, the injury in that case is not fairly [14] traceable to the government's action, even though it may have encouraged the hospitals to deny access, because it was fairly traceable to the independent decisions of third parties, the hospitals themselves.

That's exactly what we have here. We have an independent decision by individuals not to respond to the census. Moreover, that independent decision is unlawful because there's a statute that makes individuals—it requires individuals to respond to the census.

THE COURT: Why does that matter? I think you made an effort to distinguish Rothstein on that ground, or at least the ground that the defendant's conduct in that case was allegedly unlawful and it's not here. I would think for standing purposes that that's more a merits consideration than a standing question. For standing purposes, it's really just a question of whether plaintiffs can establish injury that resulted from some conduct of the defendants, in other words, injury and

causation. What does it matter if conduct is unlawful, unlawful, or not?

MR. SHUMATE: It matters, your Honor, because the test is that the injury must be fairly traceable to the government's conduct; not the independent actions of third parties. And it is not fair to attribute to the government the unlawful decisions of third parties not to respond to a lawful question.

You mentioned the Rothstein case. That case was [15] fundamentally different. That involved funding terror. That is fundamentally different than adding a question to the census questionnaire. And it's fair to assume that there would be a causal relationship between giving money to terrorists and the terrorists' acts themselves.

THE COURT: But the question is simply whether the independent acts of third parties intervening break the chain of causation such that it's no longer fairly traceable. I think in that—just looking at it from that perspective, what does it matter whether the conduct on either side is legal or not legal? It's just a simple question of whether it causes injury and whether it's fairly traceable.

I mean, in other words where—can you point me to any Supreme Court case or Second Circuit case that says that whether—that the standing inquiry turns on whether the acts of either the defendant or the intervening third parties are lawful or unlawful?

MR. SHUMATE: There are cases. I believe it's the O'Shea case from the Supreme Court that says in the context of mootness, which is another related judicial review doctrine, that we assume that parties follow

the law. And so here we should assume that individuals would respond to the census consistent with their legal duty.

Let me put it this way. If everybody in America responded to the census consistent with their legal duty, would [16] the plaintiffs have any reason to complain about the citizenship question? Of course not because there would be no undercount at all. Every person in America would be counted. They would have no reason to complain about the citizenship question or any fear of an undercount or loss of federal funding or apportionment.

Put it another way, as the Court did in Simon. If the Court were to strike the citizenship question from the census questionnaire, would that address or redress all the plaintiffs' fear of an injury? Probably not because, as they acknowledge, there's always an undercount in a census and individuals will not respond to the census questionnaire for a variety of reasons.

THE COURT: Well it would redress the injury to the extent that it is fairly traceable to the citizenship question.

MR. SHUMATE: But it is not fairly traceable to the citizen question. And the Simon Court talked about the chain, the speculative chain of inferences that you had to reach in that case to trace the injury from the government's action to the ultimate injury. And here there are at least three steps in the chain of causation. I've talked about them already. I don't need to repeat them.

THE COURT: Let me ask you one final question on that front and then I'll hear from the plaintiffs on standing.

You rely pretty heavily on the Supreme Court's [17] decision in Clapper and the chain of causation or the chain of inferences that the Court found inadequate there. Isn't there a fundamental difference between that setting and this in the sense that the plaintiffs there were individuals and essentially needed to prove that they themselves had been subjected to surveillance and it was that inquiry that required the multiple levels of inferences that the Court found inadequate?

Here, particularly in the states case where the plaintiffs are states and cities and counties and the like, we're talking about an aggregate plaintiff. So there is no need to prove that a particular person didn't respond or is not likely to respond to the census in light of question. The question is just, on an aggregate level, will it depress the rates and on that presumably one can look at the Census Bureau's own history and studies and the like. Why is that not fundamentally different and make it a different inquiry than the one that was made in Clapper?

MR. SHUMATE: Certainly the injuries alleged in Clapper and this case are different but the standing principles are not. They still have to allege an injury that is not speculative, that is concrete certainly, or at least substantial risk that that injury will occur. Now this arises in a different context, to be sure, but still they have alleged an injury that is speculative at this point, and it is not [18] fairly traceable to the government because of the independent action of the third parties that are necessary for that action to occur. As I said earlier, it's not fair to attribute to the government actions of third parties that violate a statute that the government is attempting to coerce people to respond

to the census. So it is not fair to attribute to the government their failure to respond when the government is merely adding a question to the form itself.

THE COURT: Let me hear from the plaintiffs on the standing, please. If you could just for the record make sure your repeat your names.

MR. SAINI: Your Honor, Ajay Saini from the State of New York for the plaintiffs.

THE COURT: Proceed.

MR. SAINI: Your Honor, the plaintiffs intend to make two points here today. First, that the injuries that they have alleged are not speculative and, in fact, the plaintiffs' action here, the inclusion of citizenship question on the 2020 census, creates a substantial risk of an undercount and poses a serious threat to plaintiffs' funding levels as well as apportionment and representational interests; and our second point that the plaintiffs' injuries are in fact fairly traceable to the defendants' actions.

THE COURT: Does your argument depend on my accepting that the substantial risk standard is still alive and not [19] inconsistent with certainly impending.

MR. SAINI: No, your Honor. We believe that there are immediate injuries that have occurred here. We have alleged that at paragraph 53 and—52 and 53 in which we state that the announcement of the citizenship question has an immediate deterrent effect and is already causing individuals to choose not to, in anticipation of the census, not cooperate. But that said, the substantial risk standard was affirmed just two years ago in Susan B. Anthony List v. Driehaus and as a result—

by the Supreme Court, and as a result the substantial risk standard is available here.

Your Honor the plaintiffs' injuries here are not speculative. First and foremost, the plaintiffs have shown that there is a substantial risk that an undercount will occur and the statements by the defendants over the last 40 years, the repeated determination by the Census Bureau that a citizenship question will, in fact, increase nonresponse, and not only increase nonresponse, but those determinations also include in the statements that a citizenship question would deter cooperation with enumerators going door to door seeking to count nonresponsive households is sufficient to find that there is a substantial risk of undercounting here.

The defendants have mischaracterized paragraph 53 of our complaint. We have, in fact, alleged that typical forms of nonresponse follow-up will be ineffective at capturing [20] individuals who are intimidated by the citizenship question. And the typical form of nonresponse follow-up there is the use of enumerators going door to door. And, again, Census Bureau's longstanding determinations on this serve as sufficient proof to show that, in fact, the nonresponse follow-up operations —that there is a substantial risk that they will be effective. In addition, your Honor this is—we are still at the beginning stage of this litigation and to the extent that we need to determine whether or not some unspecified nonresponse follow-up operations will somehow reduce potential undercount, that would require further factual development at later stages of the litigation.

THE COURT: Your view is that, therefore, I cannot or should not consider the government's announced procedures and plans on that front?

MR. SAINI: You need not consider it, your Honor, but even if you were to consider it these unspecified allegations regarding nonresponse follow-up would not be enough to defeat the plaintiffs' claim that there is, in fact, a substantial risk of an undercount here.

THE COURT: What's your answer to the argument that there are multiple other steps in the chain of inferences that are required for you to intervene including, for example, that it will affect the counts in your geographic jurisdiction disproportionately given the complex formulas at issue here for [21] apportionment, for funding, etc., essentially it's too speculative to know whether and to what extent it will have an effect and that ultimately you also need to prove that it has a material effect on those?

MR. SAINI: Your Honor, first we would note that we are at the pleading stage here so we do not need to determine with certainty the exact level of injury that we expect to suffer, if we do intend to provide further factual development in the form of expert and fact discovery to help further elucidate the injuries that we expect to result.

But more importantly, your Honor, there is plenty of case law relating to—from here in the Second Circuit relating to the viability of funding harms from undercounts such as in Carey v. Klutznick, for instance, the Court recognized that funding harms were sufficient to establish Article III standing on the basis of plaintiffs' State and City of New York's claims that an

undercount would affect their federal formula grants. And, similarly, the Sixth Circuit found in the City of Detroit v. Franklin that undercounting would affect potential funding under the Community Development Block Grant Program which we also have alleged in our complaint.

The last thing to note here—

THE COURT: Can I ask you a question. Mr. Shumate's argument is that Carey is different because it's a post-census [22] case and not a pre-census case and in that regard it didn't involve the same degree of speculation with respect to there being an undercount. What's your answer to that?

MR. SAINI: Our answer to that, your Honor, is, again, plaintiffs here—the defendants here have repeatedly recognized that a citizenship question will impair the accuracy of the census both by driving down response rates but also by deterring cooperation with enumerators. That specific fact of government acknowledgment that this causal connection exists and that there's a substantial likelihood that a citizenship question will result in undercounts is significant here.

In addition, we have also pointed to, in the complaint at paragraphs 50 and 51, the results of pretesting conducted by the Census Bureau which shows unprecedented levels of immigrant anxiety. That pretesting also reveals that immigrant households, noncitizen households are increasingly breaking off interviews with Census Bureau officials. The results of that pretesting show that not only is there a substantial likelihood of an undercount here but there's a substantial

likelihood of a serious undercount here. That's more than enough for plaintiffs to meet their burden.

THE COURT: And presumably those allegations are relevant to the question of whether the in-person enumerator follow-up would suffice to address any disparity; is that correct?

[23] MR. SAINI: Yes, your Honor.

THE COURT: Can you turn to the question of traceability and address that. The language in the cases suggest that the intervening acts of third parties don't necessarily break the chain of causation if there is a coercive or determinative effect. I think the government's argument here is that there is no coercive effect. In fact, to the extent that the government coerces anything, it coerces people to respond to the census because it's their lawful obligation to do so.

So why is that not compelling argument?

MR. SAINI: Your Honor, the courts have repeatedly acknowledged, including the Second Circuit just last week in NRDC v. NHTSA that the government's acknowledgment of a causal connection between their action and the plaintiffs' injury is sufficient to find that the defendants' injury—the plaintiffs' injury is fairly traceable to the defendants' conduct and that case law is sufficient to address this particular point.

With respect to the illegality point that the defendants have brought up here, we would point first to Rothstein which shows that the illegal intervening actions of a third party do not break the line of causation.

In addition, your Honor, while we haven't cited this in our papers because this point was first brought up

and [24] explored in a reply brief, there are a line of cases relating to data breaches, including in the D.C. Circuit, Attias v. CareFirst, in which plaintiffs' injuries related to identity theft, were fairly traceable to a company's lack of consumer information data security policies in spite of the intervening illegal action of the third parties, namely the hackers stealing that confidential information.

THE COURT: Can you give me that citation?

MR. SAINI: I can give that to you—it's in my bag, so I will give that to you shortly. Apologize about that.

THE COURT: All right. Very good. Why don't you wrap up on standing and we'll turn to the political question and APA question.

MR. SAINI: One last note on standing, your Honor. The plaintiff need only show that one city, state, or county within their coalition has Article III standing to satisfy the Article III requirement for the entire coalition. As a result, it's more than plausible to include that at least one of the cities, states and counties that we have alleged harms for related to funding and apportionment are likely and substantial—at a substantial risk of harm here.

THE COURT: All right. Thank you.

MR. SAINI: Thank you, your Honor.

THE COURT: Mr. Shumate, back to you. Mr. Saini can look for that cite in the meantime.

[25] Talk to me about political question and the APA and, once again, my question to you is why are those arguments not foreclosed by Carey v. Klutznick?

MR. SHUMATE: Your Honor, even assuming the plaintiffs have standing the case is not reviewable for two reasons: One, the political question doctrine, the second—

THE COURT: You have to slow down a little bit.

MR. SHUMATE: The APA is not reviewable because this matter is committed to the agency's discretion.

With respect to Carey, again, that case did not involve the addition of the question on the census questionnaire. There was very little analysis of the political question doctrine in that case. So it's hard to view that case as foreclosing the arguments we're making here.

THE COURT: But I don't understand you to be arguing that the decision with respect to the questions on the questionnaire is a political question and other aspects of the census are not political questions, or is that your argument? And to the extent that is your argument, where do you find support for that in the text of the enumeration clause?

MR. SHUMATE: So our argument is that the manner of conducting the census is committed to Congress, and Congress has committed that to the Secretary of Commerce. So to be sure there have been cases reviewing census decisions but those have been decisions involving how to count, who to count, things [26] like that, should we use imputation—

THE COURT: Isn't that the manner in which the census is conducted?

MR. SHUMATE: No. Those go squarely to the question of whether there's going to be a person-by-person headcount of every individual in America. That

is the actual enumeration. So in those cases there was law to apply. There was a meaningful standard. Is there going to be an actual enumeration?

This case is fundamentally different. This doesn't implicate those issues how to count, who to count. It implicates the Secretary's information gathering functions that are pre-census itself. And there is simply no case that addresses that question or decides—or says that it's not a political question.

THE COURT: Can you cite any case that has projected challenges to the census on the political question grounds?

MR. SHUMATE: No, there haven't been any cases like this one where a plaintiff is challenging the addition of a question to the census questionnaire itself. There have been cases—

THE COURT: You're telling me in the two hundred plus years of the census and the pretty much every ten-year cycle of litigation arising over it there has never been a challenge to the manner in which the census has been conducted; this is the [27] first one?

MR. SHUMATE: There has never been a challenge like this one to the addition of a question on the census questionnaire.

THE COURT: So it is specific to the addition of a question then.

MR. SHUMATE: Right. Right. So there have been cases—

THE COURT: In other words, that's the level on which I should look at whether it's a political question

and the question—literally adding the question is itself a political question. That's your argument?

MR. SHUMATE: Right. You don't need to go any further than that. Because our argument is that the Secretary's choice, or Congress's choice of which questions to ask on the census questionnaire is a political question. It is a value judgment and a policy judgment about what statistical information the government should collect. And there are no judicially manageable standards that the court can apply to decide whether that's a reasonable choice or not.

THE COURT: Why isn't the standard, and this becomes relevant to the issues we'll discuss later, why isn't the standard the one from the Supreme Court's decision in Wisconsin v. City of New York that it has to be reasonably related to the accomplishment of an actual enumeration? Why is that not the [28] standard and why is that not judicially manageable?

MR. SHUMATE: Because that case implicated the actual enumeration question. So there is a standard as to decide whether the Secretary's actions are intended to count every person in America. But that's not this case.

THE COURT: Isn't that the ultimate purpose of the census?

MR. SHUMATE: That is the ultimate purpose of the census, but the manner of conducting the census itself, the information-gathering function in particular is a political question. There is simply no law that the Court can find in the Constitution to decide whether the government should collect this type of information or that type of information.

THE COURT: So is it your argument that if the Secretary decided to add a question to the questionnaire that asks who you voted for in the last presidential election, that that would be unreviewable by a court?

MR. SHUMATE: It would be reviewable by Congress but not a court. That demonstrates why this is a political question, because Congress has reserved for itself the right to review the questions.

Two years before the census the Secretary has to submit the questions to Congress. If Congress doesn't like the questions, the Congress can call the Secretary to the Hill and berate him over that; or they can pass a statute and say no, [29] we're going to ask these questions. That's how the census used to be conducted. It used to be that statutory decision about which questions to ask on the census. But Congress has now delegated that discretion to the Secretary. But ultimately it is still a political question about the manner of conducting the census that is committed to the political branches.

THE COURT: What if the Secretary added a question that was specifically designed to depress the count in states that—we live in a world of red states and blue states. Let's assume for the sake of argument that the White House and Congress are both controlled by the same party. Let's call it blue for now. And let's assume that the Secretary adds a question that is intended to and will have the predictable effect of depressing the count in red states and red states only. Again, don't resist the hypothetical. Your argument is that that's reviewable only by Congress and even if Congress, even if there's a political breakdown and basically

Congress is not prepared to do anything about that question, that question is not reviewable by a court?

MR. SHUMATE: Correct. Because it is a decision about which question to ask. It wouldn't matter what the intent was behind the addition of the question. It's fundamentally different than a question, like the courts have reviewed in other cases, about who to count, how to count, things like that, should we count overseas federal employees. That's a [30] judicially manageable question. We can decide whether those individuals should be counted or not. It's different than whether sampling procedures should be allowed because it implicates the count itself. This is the pre-count information-gathering function that is committed to the political branches.

THE COURT: A lot of your argument turns on accepting that the plaintiffs' challenges to the manner in which the census is conducted as opposed to the enumeration component of the clause. Isn't the gravamen of the plaintiffs' claim here that by virtue of adding the question it will depress the count and therefore interfere with the actual enumeration required by the clause?

MR. SHUMATE: They're trying to make an actual enumeration claim, but their factual allegations don't implicate that clause of the Constitution at all because what they're challenge is the manner in which the Secretary conducts the information-gathering function delegated to him by Congress.

So there is no allegation in the complaint, for example, that the Secretary had not put in place procedures to count every person in America. I think they would have

to concede that the Secretary has those procedures in place and intends to count every person in America.

Now they argue that—I will get to this later—[31] they argue that the question will depress the count itself. But that would lead down a road where they can—plaintiffs could challenge the font of the form itself, the size of the form, whether it should be put on the internet, or the other questions on the form itself: Race, sex, Hispanic origin. These are matters that are committed to the Secretary's discretion for himself.

THE COURT: That may be committed to his discretion but that's a different question than whether they're completely unreviewable by a court, correct?

In other words, it may well be that there's a place for courts to review the decisions of the Secretary but giving appropriate deference to those decisions? Isn't that a fundamental distinction?

MR. SHUMATE: That is correct, your Honor. Even if you assume that it is not a political question, the court would still—should grant significant deference to the Secretary if the court gets to the enumeration clause claim.

THE COURT: Let's talk about the APA argument and whether it's committed to the discretion of the agency by law.

Can you cite any authority for the proposition that a census decision is so committed or is your point that this case has never—this is an issue of first impression effectively?

MR. SHUMATE: The later point, your Honor. This is a question of first impression. However, Web-

ster v. Doe, a [32] Supreme Court case, involved similar statutory language. I'll read that language. It said—

THE COURT: How do you square that with Justice Stevens' concurring opinion in Franklin where he essentially distinguished Webster on several grounds?

MR. SHUMATE: He did not get a majority of the Court, your Honor, so it wouldn't be controlling.

THE COURT: I understand that. I'm not controlled by it. But on the merits, tell me why he is not right.

In other words, the language in Webster was deemed advisable. That's not the language here. The structure of the Act at issue in Webster and the purpose of the Act, namely national security, implicated fairly significant considerations that are absent here. Here, there's an interest in transparency and the like that was absent or the exact opposite in Webster.

MR. SHUMATE: I respectfully disagree. To be sure, Webster involved national security where the courts have historically deferred significantly to the political branches. But so have courts also deferred to political branches when it comes to the census. The Wisconsin case from the Supreme Court makes that quite clear.

THE COURT: But holds that it's reviewable.

MR. SHUMATE: A case involving the actual enumeration question, not a case involving the Secretary's [33] information-gathering function.

And I think we need to focus on the specific language of the statute itself, which was not involved—not at issue in Franklin, did not involve a question about what questions to ask on the form.

The statute here says: Congress has delegated to the Commerce the responsibility to conduct a census, quote, in such form and content as he may determine.

THE COURT: Slow down.

MR. SHUMATE: Such form and content as he may determine. As he may determine. That is very similar to the language in Webster, that he deems advisable.

So there is simply nothing in the statute itself that a court can point to, to decide whether it's reasonable to ask one question or another because the statute says he has—the Secretary himself has the discretion to decide the form and content of the census questionnaire itself.

THE COURT: I take it that language was added to the statute in 1976; is that right?

MR. SHUMATE: I'm sorry. I don't understand.

THE COURT: That language was added to the statute in 1976?

MR. SHUMATE: I think the statute I'm pointing to is a 1980 statute, Section 141 of the census, because it says the Secretary shall conduct the census in 1980 and years—so [34] perhaps—

THE COURT: Probably passed before 1980.

MR. SHUMATE: Right. Right.

THE COURT: Is there anything in the legislative history that you're aware of that suggests that Congress intended to render the Secretary's decisions on that score totally unreviewable?

MR. SHUMATE: I'm not aware of any legislative history, your Honor, on this question about whether

courts should be permitted to review the Secretary's choice of which questions to ask on the census.

THE COURT: All right. Very good. Anything else on these two points? Otherwise I'll hear from plaintiffs.

MR. SHUMATE: I don't think so, your Honor.

THE COURT: All right. Thank you.

Good morning.

MS. GOLDSTEIN: Good morning, your Honor.

Elena Goldstein for the plaintiffs. Before I begin, your Honor, I do have that citation that my colleague referenced. Attias v. CareFirst, Inc. That is 865 F.3d 620.

THE COURT: Thank you.

MS. GOLDSTEIN: That was from 2017.

THE COURT: You may proceed.

MS. GOLDSTEIN: Thank you, your Honor.

Before I get to the heart of defendants' arguments, I [35] want to address this decision that they've made to get very granular with respect to the question, with respect to the exact conduct of the Secretary here.

The defendants contend repeatedly that this is a case of first impression and that no case has ever challenged a question on the census. That fact highlights the extreme and outlandish nature of defendants' conduct here.

If you look at the wide number of census cases that are out there, that I know we've all been looking at, there's a common theme. And the common theme is that the Census Bureau and the Secretary aim for accuracy.

If you look at the Wisconsin case, there the Secretary determined not to adjust the census using a post-enumeration survey had some science on his side. The Court says the Secretary is trying to be more accurate, has some science, we will defer. Utah v. Evans is similar. The determination to use a type of statistic known as hot-deck imputation, the Secretary says we're trying to be more accurate, we will defer.

This case turns that factual predicate on its head and in a most unusual way. Instead of the Secretary aiming for accuracy, the Secretary here has acknowledged that he's actually moving in the opposite direction.

THE COURT: So let's say I agree with you. Why under the language of the clause and the language of the statute is that not a matter for Congress to deal with?

[36] Congress has required the Secretary to report to Congress the questions that he intends to ask sufficiently in advance of the census that Congress could act, that the democratic process could run its course. Why is that not the answer instead of having a court intervene?

MS. GOLDSTEIN: Your Honor, defendants confuse the grant of authority to Congress for a grant of sole and unreviewable authority. They draw this—there's a vast number of cases out there that are holding, as the Court has noted, that these census cases are not, in fact, political questions. So in order to distinguish between all of those cases and this one case that defendants argue is not justiciable defendants proffer this novel distinction between the manner of the headcount and the headcount itself. But that distinction is a false dichotomy that collapses on further review. In many

cases, including this one, the manner of the headcount absolutely impacts the obligation to count to begin with. In this case plaintiffs have specifically alleged that defendants' decision to demand citizenship information from all persons will reduce the accuracy of the enumeration. That is, in defendant's effective parlance, a counting violating. And it's easy to think of many other examples in which the manner of the headcount is absolutely bound up in the headcount obligation itself. For example, the decision, as defendants point out, between Times New Roman and Garamond font, likely [37] within the government's discretion. But the decision to put the questionnaire in size two Garamond font that's unreadable, for example, on the questionnaire, that would be certainly a decision that would impact the accuracy of the enumeration. The decision to send out all the questionnaires in French would impact the accuracy of the enumeration.

THE COURT: Right. But not every problem warrants or even allows for a judicial solution, right. Indeed the Supreme Court said as much last week in some cases, like why is the remedy there not Congress stepping in and taking care of that problem, mandating that it be distributed in 17 languages instead of one, mandating that it be in twelve-point font, etc.

Why is a court to supervise, at that level of granularity, the Secretary's conduct that is committed to him by statute?

MS. GOLDSTEIN: Your Honor, defendants' political question argument depends on this manner versus headcount distinction. They acknowledge that everything else courts can review, not review on that granular level but review under Wisconsin to affirm that the

Secretary's decision bears a reasonable relationship to the accomplishment of an enumeration.

Courts do not analyze cases in this fashion. The starting point, as the Court has recognized, is Carey. This is a case that is, I think by any fair reading, a manner case. It involved the adequacy of address registers. It [38] involved the adequacy of enumerators going out. The Court there holds squarely that this is not a political question.

And looking at even Wisconsin, your Honor, the Court there recognized that the Secretary's discretion to not adjust the census in that case arises out of the manner language of the statute.

Virtually every court to consider this issue has held the fact that Congress has authority over the census does not mean that that is sole or unreviewable authority.

THE COURT: What is the judicially manageable standard to use?

The defendants throw out some hypotheticals as to whether it would constitute a violation of the—let me put it differently.

Is the standard the pursuing accuracy standard that you articulate in your brief and to some extent you've articulated here?

MS. GOLDSTEIN: Yes, your Honor.

I think that the baseline standard is the standard in Wisconsin, that defendants are obligated to take decisions that bear a reasonable relationship to the accomplishment of an actual enumeration, and accomplishing an actual enumeration means trying to get that count done, which means pursuing accuracy. Whatever the

outer limits of that decision may be, [39] your Honor, it is not taking decisions that affirmatively undermine that enumeration.

THE COURT: So defendants cite a number of hypotheticals in their reply brief, for example, the question of whether to hire 550 as opposed to 600,000 in-person enumerators; the question of whether to put it in 12 languages versus 13 languages.

Is it your position that those aren't reviewable but presumably acceptable on the merits or—I mean what's your position on those?

MS. GOLDSTEIN: Yes, your Honor.

The vast majority of those kinds of decisions made by the Secretary are well within the bound of the discretion that's laid out in Wisconsin. But as you push those examples further, the decision to send 500 enumerators versus 450, clearly within the Secretary's discretion. Both accomplish an actual enumeration and are calculated to do so.

But the decision to send no enumerators or no enumerators to a particular state, that begins to look more questionable as to whether or not that decision would bear a reasonable relationship to accomplish an enumeration and, under defendants', theory would be entirely unreviewable.

THE COURT: Turning to the APA question, I think you rely in part on the mandatory language in some places in the census act. There is no question that the Act mandates that [40] the Secretary do X, Y, and Z but the relevant clause here would seem to be the permissive one, namely, in such form and content as he may determine.

So why are the mandatory aspects of the Act even relevant to the question of whether it's committed to agency discretion?

MS. GOLDSTEIN: Your Honor, with respect to the plain language of the Census Act, I would argue that Section 5 which directs the Secretary to determine the question—the mandatory language directs the Secretary to determine the questions and inquiries on the census is more specific than the form and content language that even arguably is permissive in Section 141.

In addition, as plaintiffs have noted in that their papers, there are multiple sources for law to apply in this case, both from those mandatory requirements of the Census Act from the constitutional purposes undergirding the census, the Constitution and the Census Act, and the wide array of administrative guidance out there dictating specifically how the Census Bureau has and does add questions to the decennial questionnaire. In light of that mosaic of law, there is no question that the vast majority of courts to consider this question have concluded that challenges to the census are reviewable, that there is law to apply.

THE COURT: And to the extent that you rely on the [41] Census Bureau's own guidance, don't those policy statements have to be binding in order to provide law to apply?

MS. GOLDSTEIN: No, your Honor. The starting point here—so defendants are arguing that there is no law to apply at all. And the Second Circuit in the Salazar case makes very clear that the Court can look to informal agency guidance to determine whether or not there is law to apply.

In Salazar the Court was looking to dear-colleague letters that no one alleged gave rise to a finding of a private right of action. But at the same time those dear-colleague letters, in conjunction with other law out there, formed the basis for agency practices and procedures that departures therefrom could be judged to be arbitrary or capricious.

So, too, in this case. Plaintiffs have identified a wide arrange of policies and practices and procedural guidance dictating the many testing requirements that questions are typically held to and required to go through prior to being added to the decennial census the defendants have entirely ignored here. I'm happy to distinguish the cases that defendants have cited if the Court would like me to continue on this.

THE COURT: No. I think I'd like to turn to the enumeration clause issue at this point.

Mr. Shumate, you're back up.

MR. SHUMATE: Thank you, your Honor.

[42] THE COURT: Do you agree that the relevant standard comes from Wisconsin is the reasonably related or reasonable relationship to the accomplishment of an actual enumeration that that is the guiding standard here?

MR. SHUMATE: I think that would be the guiding standard in a case involving a question over whether the Secretary has procedures in place to conduct an actual enumeration, but that is not this case. This is a case involving the information-gathering function that takes place during the census. And there is no standard to apply.

THE COURT: What is the authority—Ms. Goldstein just argued that it's a false dichotomy and a false distinction that you're trying to draw between the manner and the enumeration. I mean it seems to me that there is some—it's hard to draw that—a clear distinction in the sense that clearly the manner in which the Secretary conducts the census will determine, in many instances, whether it actually is an accurate actual enumeration.

So are there cases that you can point to that draw that distinction and indicate that it is as bright line as you're suggesting?

MR. SHUMATE: I can't, your Honor, because frankly there hasn't been a case like this one involving the facial challenge to the addition of a question itself. But even assuming that is the standard, there's nothing in the [43] Constitution that forecloses the Secretary from asking this questions on the census questionnaire. There is no allegation that the Secretary doesn't have procedures in place to conduct person-by-person headcount in the United States. And as the Secretary said in his memo at pages one and eight, he intends, again, procedures in place to make every effort to conduct a complete and accurate census. So they're not challenging the procedures themselves. They're not challenging the follow-up operations. They're just challenging the addition of a question itself.

THE COURT: What about the hypothetical that the Secretary decides to send in-person enumerators only to states in certain regions of the country. Why would that not be a violation of the enumeration clause?

MR. SHUMATE: I think that would be, first of all, a very different case, but there may be a valid claim there if the Secretary had not put in place procedures to count every person in the United States.

THE COURT: Procedures sounds an awful lot like manner, no? In other words, why is that not a manner case as well that ultimately goes to the enumeration?

MR. SHUMATE: Because it implicates the count itself. It's not the questions on the form itself that are used to collect the information to count itself. So it's a fundamentally different situation.

[44] But, again, they don't have those allegations in the complaint here that the number of enumerators are insufficient. The only challenge here is to the addition of a question itself.

We can't ignore the fact that this question has been asked repeatedly throughout our history, as early as 1820 and as most recently as the 2000 census. And as the Wisconsin Court made clear, history is fundamentally important in a census case because the government has been doing this since 1790.

THE COURT: I take it your view is I can consider that history on a 12(b)(6) motion because there are undisputed facts, essentially historical facts.

MR. SHUMATE: Historical facts that take judicial notice of the fact that the question has been asked repeatedly throughout history.

THE COURT: Why does history not cut in both directions in the sense that the question was abandoned from the short-form census since 1950; in other

words, for the last 68 years it has not been a part of the census.

MR. SHUMATE: It has been part of the long-form census which went to one in six households, and those households didn't get the short form. So under their view it was unconstitutional for the government to send the long-form census to one in six houses, it was unconstitutional for the [45] government to ask this question in 1950 and in 1820, and that cannot possibly be right.

Let me address their point about the standard is accuracy, the Secretary has to do everything to pursue accuracy. That can't possibly be the standard. It's a made-up standard. It doesn't come from the cases. And it's simply unworkable.

On this question of the font on the form itself. There's nothing for the court to evaluate to decide whether that would be a permissible choice or not. It would give rise to courts second guessing everything that the Secretary does to collect the information for the census. And that's—it's simply not a case where the allegations implicate the procedures that are in place to count every person in America; instead this is case implicating the information-gathering function.

THE COURT: Now in United States v. Rickenbacker, Justice Marshall, for whom this courthouse is named, wrote that, "The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively. The questions contained in the household questionnaire related to important federal concerns such as housing,

labor and health and were not unduly broad or sweeping in their scope."

[46] Now admittedly that was in the context of a Fourth Amendment challenge to a criminal prosecution of someone who refused to respond to the census. But why is that not the relevant standard here?

It seems to me that the census's dual purpose, I think, has always been about getting an accurate count for purposes of allocating seats in the House of Representatives, but from time immemorial it seems that it also was used to collect data on those living in this country and that that has been deemed an acceptable, indeed, important function of it.

So why is that not a sensible standard to apply here?

MR. SHUMATE: Your Honor, it may be. But if that's the standard, there is no reason that the addition of a citizenship question would run afoul of that standard.

Again, the question has been asked repeatedly.

THE COURT: First of all, two questions. One is doesn't that provide a judicially manageable standard? Again, recognizing the deference of it to the Secretary on his judgments with respect to it, but at least it is a standard against which the Secretary's judgments can be measured, no?

MR. SHUMATE: I don't know where that standard comes from, your Honor. It certainly doesn't come from—

THE COURT: Thurgood Marshall.

MR. SHUMATE: That doesn't come from the Constitution, because the Constitution simply says the man-

ner of conducting [47] the census. The plaintiffs are right. That's not the standard that the plaintiffs are pressing. They're pressing the standard that the Secretary has to do everything to pursue accuracy. And if that's right, then the plaintiff can claim that the questions about race and sex and Hispanic origin are also unconstitutional.

THE COURT: But you don't make the argument that that's the relevant standard to apply in your brief?

MR. SHUMATE: No, your Honor. The standard to apply, if there is one, is actual enumeration. And the plaintiffs haven't made any allegations that the Secretary does not have procedures in place to conduct an actual enumeration.

THE COURT: And the purposes for which the question was added, obviously in the Administrative Record the stated purpose was to enforce—help enforce the Voting Rights Act. Are there additional purposes that would justify addition of the question and, relatedly, are those purposes somewhere in the record?

MR. SHUMATE: Your Honor, the standard rationale was the one provided by the Secretary in his memorandum. If we ever get to the APA claim, that would be the basis on which the Court would review the reasonableness of his decision.

But in terms of the constitutional claim, plaintiffs have to show, notwithstanding all the significant deference that the Secretary is entitled to, that the addition of this [48] question violates the Constitution. But, again, there is no suggestion here that the Secretary does not have procedures in place to count every person in America, and it can't be the standard that

anything that might cause an undercount would be somehow unconstitutional, because that would call into question many other questions on the form, and it would ignore the long history that this question has been asked on the census.

THE COURT: And I guess—what if the political climate in our country was such that the administration was thought to be very anti gun, let's say, and there were perceived threats to gun ownership, thoughts that the administration and the federal government would seize people's guns, and that administration proposed adding a question to the census about whether and how many guns people owned. Do you think that would not violate the enumeration clause?

MR. SHUMATE: It would not violate the clause, and Congress could provide a remedy and pass a statute and say this is not a question that should be asked on the census. It wouldn't be for a court to decide this question is bad, this one is good. That is something that is squarely committed to the political branches to decide.

THE COURT: Who is handling this for the plaintiffs?

Ms. Goldstein again. All right.

Tell me why the Thurgood Marshall standard shouldn't apply here.

[49] MS. GOLDSTEIN: Your Honor, even if the Thurgood Marshall standard would apply, as I can address in a moment, this question would still violate it. But the Supreme Court in Wisconsin, a more recent case, has made clear the standards that the Court uses to assess the Secretary's decisionmaking authority with respect to the census and that is whether or not the Secretary's decisions bear a reasonable relationship

to the accomplishment of an actual immigration keeping in mind the constitutional purposes of the census.

THE COURT: Tell me, measured against that standard, why asking any demographic questions on the census would pass muster, in other words, presumably asking about race, about sex, about all sorts of questions that have long been on the census, I mean they certainly don't—they're not reasonably related to getting an accurate count because they don't do anything to advance that purpose and they presumably, to the extent they have any effect, it is to depress the count if only because people view filling out the form as more of a pain.

So how would any of those questions pass muster under that test?

MS. GOLDSTEIN: Your Honor, this is not an ordinary demographic question.

THE COURT: That's not my question though. In other words, based on the test that you are articulating wouldn't any demographic question on the questionnaire fail?

[50] MS. GOLDSTEIN: Absolutely not, your Honor. Ordinary questions which are subject to extensive testing procedures that are precisely designed in order to assess and minimize and deal with any impacts to accuracy likely do, when they emerge from the end point of that testing, bear a reasonable relationship to the accomplishment of an actual enumeration. The Secretary is permitted under Wisconsin to privileged distributional accuracy over numerical accuracy. So if adding a gender question or a race question brings down the count a certain percent, there is no suggestion that

that is disproportionately impacting certain groups as defendant Jarmin has acknowledged with respect to this situation.

THE COURT: What about sexuality? Could the Secretary ask about sexuality in the interests of getting public health information, perhaps?

MS. GOLDSTEIN: Your Honor, I think to answer that question we would need to wait and see the procedures that the Census Bureau puts that question to, for example, with respect to the race and ethnicity question that the Secretary looked at for nearly a decade subjecting it to focus group testing cognitive testing, all sorts of testing to assess the impact on accuracy.

Now to the extent that a sexuality question had a disproportionate impact that the Secretary acknowledged and recognized and decided to take an action to reduce the accuracy [51] of the census nonetheless, that may well state a claim. But the vast majority of decisions that the Secretary may make will not.

Now in this case—there may be hard cases out there, your Honor, but this case is an easy case.

THE COURT: And is the standard an objective one, I assume? If one doesn't like at the intent of the Secretary or the government in adding the question, presumably it's an objective test of whether it's reasonably related to the goal of an actual enumeration.

MS. GOLDSTEIN: That is correct, your Honor.

However, defendants acknowledged recognition of the deterrent effect of this question certainly is good evidence that this will, in fact, undermine the enumeration

and does not reasonably relate it to accomplishing enumeration.

THE COURT: But because it's objective evidence. In other words, let's assume for the sake of argument that the question was added by the Secretary to suppress the count in certain jurisdictions—I'm not suggesting that that is the case but let's assume—is that relevant to whether it states a claim under the enumeration clause.

MS. GOLDSTEIN: No, your Honor, but it may be well relevant to the claim under the APA.

THE COURT: Go back to the Thurgood Marshall standard and tell me why that should not be the relevant standard here. [52] It seems to me, as I mentioned to Mr. Shumate, that the census has long had essentially a dual purpose. On the one hand, it is intended to get an actual enumeration and count the number of people in our country for purposes of representation. On the other hand, it has long been accepted that it's a means by which the government can collect data on residents of the country. So why is—it seems to me that the questions on the questionnaire are more tethered to that later purpose and if that's the case there is a little bit of a mismatch in measuring the acceptability of a question against whether it's reasonably related to the first goal.

MS. GOLDSTEIN: Your Honor, plaintiffs are to some extent hampered on this because defendants have not proffered the standard or argued it.

THE COURT: They say there is no standard which is why it's a political question.

MS. GOLDSTEIN: But the end of that sentence that you read by Justice Marshall made clear that even on that standard of gathering additional demographic data that there are questions that are unduly broad in scope.

Now here what we are alleging, that the Secretary of Commerce has made a decision that reverses decades of settled position that the Census Bureau recognizes that this specific question will reduce the accuracy of the enumeration; in their words from 1980, will inevitably jeopardize the accuracy of the [53] count, where defendants themselves have recognized that this may have, as defendant Jarmin indicated, important impacts in immigrant and Hispanic communities against this particular historical and cultural moment where this administration's anti immigration policy—

THE COURT: Let me ask you a question about that and try and get at what role that plays in the argument. Let's assume for the sake of that argument that the prior administration had added the citizenship question in a different climate. New administration comes in, whether it's this one or some other one, that is perceived to be very anti immigrant. Does the existence of the question suddenly become unconstitutional because the political climate has changed?

MS. GOLDSTEIN: I think that the starting point in this case is significant. The starting point is a reversal of decades of the settled position. The starting point is without a single test or even explanation as to why that position is being changed. The starting point is a recognition that it will impair accuracy. I think if this is a long-standing question, this has been on the census, that might be a different situation.

Just to address defendants' contention that the historical practice weighs in favor of them, I think setting aside that I do think that this is a merits question, this gets [54] the merits wrong. This question has not been asked of all respondents since 1950. It, instead, has been relegated to the longer form instrument where the citizenship demand is one of many questions. On the ACS it can be statistically adjusted. Failure to answer does not bring a federal employee to your door, knocking on it, demanding to know if you are a citizen.

THE COURT: How can it be constitutional to include it on a long-form questionnaire and not on a short-form questionnaire? In other words, how can the constitutionality of whether the question is proffered or asked turn on the length of the questionnaire?

MS. GOLDSTEIN: The question before the Court is whether or not the decision that was made several months ago to add this question to the long-form questionnaire that goes to all households, whether or not that question is constitutional. The question of whether or not it was constitutional in 1970 I believe when it was—when the world was different, when it was originally on the long form is not before the court. The question has not been—has been asked on the ACS since 2005.

Now defendants' allegations that the ACS is effectively the same thing as the census I think really belie or ignore the allegations in plaintiffs' complaint. The Census Bureau has for decades repeatedly resisted calls to move the question from the ACS to the census precisely because while the question may perform on the ACS it does not perform on the [55] census because it undermines the accuracy of that instrument.

THE COURT: Why, measured against the reasonable relation standard that you're pressing, would the mere use of the long-form questionnaire, why wouldn't that be unconstitutional?

In other words, I think that the response rate of those who receive the long-form questionnaire is significantly lower than the response rate of those who receive the short-form questionnaire. On your argument wouldn't that be unconstitutional under the enumeration clause?

MS. GOLDSTEIN: Your Honor, I think that just the lack of testing and the conduct with respect to this decision alone makes this decision distinguishable. With respect to the change in the long-form questionnaire, with respect to the ACS, with respect to those other demographic questions, they went through considered detailed procedures designed to assess and to minimize impacts on accuracy. Those tests, those procedures were entirely ignored here. And that alone distinguishes the Secretary's conduct.

THE COURT: All right. Thank you very much.

That concludes the argument on the motion to dismiss. Let me check with the court reporter whether we need a break or not.

She is willing to proceed so I am as well.

Why don't we hear from plaintiffs on discovery since [56] they're the moving parties on that front. I think the papers are fairly adequate for me to address most of the issues on this front. In that regard I don't intend to have a lengthy oral argument but I don't want to deprive you of your moment in the sun, Mr. Colangelo.

MR. COLANGELO: Thank you, your Honor.

Good morning. Matthew Colangelo from New York for the state and local government plaintiffs. I'll make two key points regarding the record. First is that the record the United States has prepared here is deficient on its face and should be completed. It deprives the Court of the opportunity to review the whole record as it's obligated to do under Section 706 of the APA. And the second broad argument I'll make is that the plaintiffs have, even once the record is completed, we anticipate the need for extra record discovery in light of the evidence of bad faith, the complicated issues involved in this case and, of course, the constitutional claim.

So turning to the first argument, as I've mentioned, the APA requires the Court to review the whole record. In Dopico v. Goldschmidt the Second Circuit—

THE COURT: Can I ask you a threshold question, which is why I shouldn't hold off until I've decided the motion to dismiss in light of the Supreme Court's decision in the DACA litigation arising out of California.

MR. COLANGELO: The circumstances in the DACA [57] litigation, your Honor, were extremely different and distinguishable from the circumstances here. The Court in that case pointed out that the United States had made an extremely strong showing of the overbroad nature of the discovery request. I believe the solicitor general's reply on cert to the Supreme Court mentioned that they would be obligated to review and produce 1.6 million records. So it was against the backdrop of that extremely broad production request that the Court said that it might make—the Court directed the district court to stay its discovery order until it

resolved the threshold questions. Nobody is requesting 1.6 million records here, your Honor.

THE COURT: How do I know that since the question of what you're requesting is not yet before me.

MR. COLANGELO: I think, among other reasons, your Honor, you know that because the United States hasn't made any contention at all that there's anything near the size of that record that's being withheld in this case as they did in the DACA litigation.

There are, to use the language from Dopico, there are a number of conspicuous absences from the record presented here and we would draw your attention to four in particular.

The first is that with the exception of background materials, there is essentially nothing in the record that predates the December 2017 request from the Justice Department. [58] There is no record at all of communications with other federal government components. The new supplemental memo that the Secretary added to the record just twelve days ago now discloses for the first time that over the course of 2017 the Secretary and his senior staff had a series of conversations with other federal government components. None of those records are anywhere in the Administrative Record that the United States produced.

Second, again with the exception of the December 2017 memo, the United States hasn't produced anything at all reflecting the Justice Department's decision where, as here, the heart of the Secretary's rationale for asking about citizenship, according to his March decision memo, was the supposed need to better enforce sections of the Voting Rights Act. It's just not

reasonable to believe that there are no other records that he directly or indirectly considered in the course of reaching his decision. In fact, the Secretary testified to Congress under oath that we had a lot of conversations with the Justice Department. If that's the case, those conversations ought to be included in the record.

The third key category of materials that are conspicuously omitted include records of the stakeholder outreach that the Secretary did conduct over the course of—earlier this year. The Secretary's decision memo says he reached out to about two dozen stakeholders. Other than what [59] appear to be undated, after-the-fact post hoc summaries that somebody somewhere prepared of those calls, there is no information at all about how those 24 stakeholders were selected; why, for example, was the National Association of Home Builders one of the stakeholders that the Secretary elected to reach out to here. The government has omitted the Secretary's briefing materials. All of these records are records that are necessary to help understand the government's decision.

And then the final category of materials conspicuously omitted are the materials that support Dr. Abowd's conclusion that adding this question would be costly and undermine the accuracy of the count. Dr. Abowd is the Census Bureau's chief scientist. Obviously materials that he relied on in reaching that adverse conclusion are materials that the Secretary indirectly considered and that body of evidence should be included in the record as well.

THE COURT: Why don't you briefly speak to the bad faith argument and then I want to address the question of scope and what should and shouldn't be

permitted if I allow discovery. I don't know if that's you or Mr. Rios who is planning to address that.

MR. COLANGELO: I can address scope and then I will turn to Mr. Rios to address one aspect of our anticipated expert discovery, your Honor.

[60] On bad faith, your Honor, we think there are at least five indicia of bad faith here, more than enough —more than enough certainly singularly to justify expanding the record but in collection we think they make an overwhelming case.

THE COURT: List them quickly if you don't mind.

MR. COLANGELO: Why don't I focus on two. First is the tremendous political pressure that was brought to bear on the Commerce Department and the Census Bureau. The record that the Justice Department presented discloses what appear to be four telephone calls between Kris Kobach and the Commerce Secretary or his senior staff on this question at a time that the Commerce Secretary now admits he was considering how to proceed on this question. The Justice Department's only response in the paper they filed with the Court is that that appears to be isolated or unsolicited and quite frankly, your Honor, that's just not credible. The Commerce Secretary and the senior staff had four telephone calls with an adviser to the President and Vice-President on election law issues on the exact question that the Secretary now acknowledges he was then considering. Mr. Kobach presented to the Secretary proposed language to this question that matches nearly verbatim the language that the Secretary ultimately decided to add to the census questionnaire and yet the only conclusion one can draw is that it was

isolated, incidental and immaterial contact. That's just not a reasonable position to take without exploring [61] more of the record.

The second argument that I'll mention briefly, that the shifting chronology here that the Commerce Department has presented we think also presents a strong case of bad faith. The March decision memo explicitly describes the Commerce Department's consideration of this question as being in response to the requests they received from the Justice Department. The Secretary's more or less contemporaneous sworn testimony to Congress repeats that point several times. In at least three different congressional hearings he uses language like we are responding only to the Justice Department; as you know, Congressperson, the Justice Department initiated this request; and then just twelve days ago the Commerce Secretary supplemented the record and disclosed that, in fact, the Commerce Department recruited the Justice Department to request this question, which certainly suggests that the Commerce Department knew where it wanted to go and was trying to build a record to support it. The rest of the arguments are set out in our papers, your Honor.

THE COURT: So talk to me about what the scope of discovery that you're seeking is and why I shouldn't, if I authorize it at all, severely constrain it.

MR. COLANGELO: Well, your Honor, I think we're actually looking for quite tailored discovery here and I think we can stagger it, I think as an initial—

[62] THE COURT: It's grown from three or four depositions at the initial conference to twenty.

MR. COLANGELO: Fair enough, your Honor. But at the initial conference we didn't have the Administrative Record that disclosed the role of Mr. Kobach at the instruction of Steve Bannon. We didn't known that Wendy Teramoto, the Secretary's chief of staff, had a series of e-mails and several phonecalls with Mr. Kobach at the exact same time they were now considering this question.

So, respectfully, our blindfolded assessment of what we might need has expanded slightly, but I still think it's a reasonable and reasonably tailored request. And so I would say a couple of things.

First, I think the Justice Department ought to complete the record by including the materials that are conspicuously omitted and that they acknowledge exist and they ought to do that in short order and at the same time ought to present a privilege log so that we can assess, without guessing, what their claims of privilege are and why those claims are or are not defensible.

I think once we have completed the administrative record, I think there is additional discovery, particularly in the nature of testimonial evidence, some third-party discovery, of course, Mr. Kobach, the campaign, Mr. Bannon, potentially some others. I think it's critical that we get evidence from [63] the Department of Justice because the Department of Justice ostensibly was the basis for the Secretary's decision, and then expert testimony, which we can turn to in a moment.

THE COURT: And then talk to me about Mr. Kobach, Mr. Bannon. First of all, wouldn't it suffice, if I authorize discovery, to allow you to seek that discovery from the Commerce Department and/or the Justice De-

partment alone? In other words, the relevance of whatever input they gave is what impact it had on the decision-makers at Commerce and that can be answered by discovery through Commerce alone. I'm not sure it warrants or necessitates expanding to third parties and then, second to that, Mr. Bannon is a former White House adviser and that implicates a whole set of separate and rather more significant issues, namely separation of powers issues, and executive privilege issues, and so forth. Why should I allow you to go there?

MR. COLANGELO: A couple of reasons, your Honor. First of all I do think we can table the question. I'm not prepared to concede that he we don't need third-party discovery. It may well be the only way that we can understand the basis for the Secretary's decision. But I do think we can table it to see, especially if we can do it quickly, what the actual completed record looks like and what other documents and potentially other testimonial evidence may disclose. And we certainly wouldn't be seeking to take third-party depositions [64] next week.

And I appreciate the concerns, obviously, about executive privilege. But we do have the separate—two separate issues here. One is that the Secretary has testified to Congress that he was not aware at all of any communications from anyone in the White House to anyone on his team. So if it now turns out that that congressional testimony may have omitted input from Mr. Bannon, I think we would want to discuss the opportunity to seek further explication of what exactly happened.

And then the final reason why I'm not prepared to concede that this additional evidence may not be necessary is the involvement of political access here is prob-

lematic for the Commerce Department's decision in a way that might not arise in an ordinary policy judgment case for two reasons. First, it's not consistent with the Secretary's presentation of his decision in his decision memo; but second, the Census Bureau is a statistical agency that is governed by the White House's own procedures that govern how statistical agencies ought to operate and among the core tenets of those procedures is independence and autonomy from political actors. So to the extent that there was undue political involvement in the decision here, we think that it probably does bear somewhat heavily on the Court's ability to assess the record.

But I don't disagree that we can stagger it. I'm just [65] not prepared to concede now that we won't need it.

THE COURT: Let me hear from Mr. Rios briefly and then I'll here from Mr. Shumate—excuse me, not Mr. Shumate.

Go ahead.

MR. RIOS: May it please the Court, your Honor, Rolando Rios on behalf of the plaintiffs. My brief comments, your Honor, are addressed to the need for discovery on an Article I claim. My clients, Hidalgo and Cameron Counties, are on the southernmost Texas border between Mexico and the United States. It is the epicenter of the hysterical anti immigrant rhetoric from the federal government. McAllen and Brownsville are the county seats. It is a microcosm, your Honor, of what is going on across the country in the Latino community. Quite frankly, the minority community across the country is traumatized by the federal government's actions.

THE COURT: Mr. Rios, I don't mean to cut you off but if you could get to the expert discovery point that you want to make.

MR. RIOS: Yes, your Honor. The general comments that I have is that based on their own expert's testimony that the citizenship question will increase the nonresponsiveness I feel it's important that expert testimony to update that data based on the present environment is essential. Your Honor, the importance of census data is lost sometimes here. I've been practicing voting rights law for 30 years. And, quite frankly, [66] census data is the gold standard that the federal courts use to adjudicate the allocation of judicial power—I mean electorial power and political power and federal resources. So this citizenship question is designed to tarnish that gold standard and basically deny our clients the political power that they're entitled to and also federal funds.

THE COURT: Thank you very much. Let me hear from Ms. Vargas I think it is.

MR. FREEDMAN: Your Honor, do you want to hear from us before the defendants or—

THE COURT: I didn't realize that you wished to have a word.

MR. FREEDMAN: Sorry, your Honor.

THE COURT: Sure. That makes more sense, that order. Go ahead.

MR. FREEDMAN: Your Honor, John Freedman for the NYIC plaintiffs. I could add additional points to what the state did on why the record needs to be supplemented. I could point to additional gaps. A

lot of those are covered in our letter. I could point to additional evidence why expansion of the record is appropriate and layout bad faith. But I think, again, I think that's covered in the letter.

THE COURT: OK.

MR. FREEDMAN: I do think it is worth emphasizing that we have an additional constitutional claim, equal protection [67] claim, that we believe entitles us to discovery. The basis for that is Rule 26 to start with, which says that we have the right to conduct discovery to any issue that's relevant. Certainly, the equal protection claim has elements that are not and do not overlap with the APA claim, including intent and impact and the history into the decision. We think that under the Supreme Court precedence, Webster v. Doe, we are entitled to conduct discovery and that there is a parallel APA claim.

THE COURT: It strikes me that the Supreme Court's decision In re United States, the DACA litigation, counsel is cautioned in allowing discovery before a court has considered threshold issues. I think the state's case is a little different in the sense that I have heard oral argument and have already gotten full briefing on those issues and in that regard can weigh that in the balance. But obviously the motion in your case is not yet fully submitted.

MR. FREEDMAN: It will be soon.

THE COURT: It will be soon. That is true.

MR. FREEDMAN: I think with respect to our case we can argue it now, you can take it under advisement until there is a ruling. I also think there's an important distinction in the way the DACA case was handled

in terms of supplementing the administrative record and that can be going on while the government has already put forward a record that is manifestly deficient. Their work you can provide guidance to them to how [68] they supplement it while the motion is under consideration. I think that that's permitted under how the Supreme Court ruled in the DACA case.

THE COURT: Anything else?

MR. FREEDMAN: I do want—just on scope. Obviously, you were asking questions about scope and how to control it. I think that the constitutional precedence we would cite Webster v. Doe on intent of decisionmakers. All counsel have active involvement of the court in making sure discovery is tailored. We do have tailored discovery in mind. We weren't here at the May 4 conference obviously. We've always been approaching this as, because we have additional elements on our intentional discrimination claim, that we have additional things that we'd like to be able to prove, that under Arlington Heights we are entitled to prove. That's part of the reason why the deposition list is a little bit longer.

I also do think it would be helpful to get guidance from the Court on the question of the supplementation of Administrative Record. In particular, we cited cases in our letter spelling out that it's the obligation of the Agency, not just merely the Secretary, to produce records that are under consideration. We think that the Court should provide guidance that the whole record should include materials prior to December 12 and the pre-decisional determination to reach out to other agencies and have them sponsor the question. In many [69] ways looking at that prehistory, there's a parallel

between this case and what happened in Overton Park which is the seminal Supreme Court case here where the Court was hamstrung by its ability to review the case because all that the Department of Transportation had produced was effectively a post-litigation record. And I think you could look at what the Department has done here as a similar or analogous circumstance that they made a decision that they wanted to have this question. They had a response, then they said we're now on the clock, it's now time to start building our record, and that's what we're going to produce, and we don't have the real record before us.

THE COURT: Thank you.

Let me hear from Ms. Vargas and then we'll proceed.

Ms. Vargas, tell me why the supplemental memo or addition to the Administrative Record alone doesn't give rise to the need for discovery here. It seems that the ground has shifted quite dramatically; that initially in both the Administrative Record and in testimony the Secretary's position was that this was requested by the Department of Justice and lo and behold in a supplemental memo of half a page without explanation it turns out that that's not entirely the case. So doesn't that point to the need for discovery?

MS. VARGAS: Your Honor, there is nothing inconsistent between the supplemental memo and the original memo. The [70] original memo addresses a particular point in time. There is a receipt of the DOJ letter. It's uncontested that it was received on a particular date. At that point, as the Secretary said in his original memo, we gave a hard look, after we received the formal request from the Department of Justice, and

then he details the procedures and the analysis that he started at that point in time.

THE COURT: First of all, isn't it material to know that that letter was generated by a request from the Secretary himself as opposed to at least the misleading suggestion that it was from the Department of Justice without invitation?

MS. VARGAS: Your Honor, I resist the suggestion that it was misleading as an initial matter.

THE COURT: That's my question. Isn't it misleading or at least isn't there a basis to conclude that it's misleading and therefore an entitlement for the plaintiffs to probe that?

MS. VARGAS: No, your Honor. It's not misleading. It simply starts at a particular point in time and it goes forward. It doesn't speak whatsoever to the process that preceded the receipt of the DOJ memo and that's because the Administrative Record does not include internal deliberations, the consultative process, or the internal discussions that happen inter-agency or intra-agency. That's very settled law. It's black letter [71] administrative law that what is put on the administrative record is the decisional document and the informational basis for that decision but not the discussions that precede that or that go along with it. That has been the decisions of the Second Circuit, the D.C. Circuit en banc in San Luis Obispo. All of those courts speak to the fact that the internal conversations, the process documents, are not part of the administrative record and so, therefore, they wouldn't normally be disclosed. All the things that precede a decision internally, the processes, the discussions, none of that would

normally be part of an administrative record and it wouldn't normally be part of a decisional document. Normally when an agency issues a decision it doesn't go through: And then we had this discussion, and then there was this discussion and they arrive at—

THE COURT: But it does include the underlying data that the decision-maker considered or that those advising the decision-maker considered and how can it possibly be that the Secretary began conversations about this shortly after he was confirmed and there is literally virtually nothing in the record between that date and December 12 or whatever the date is that the letter arrives from the Department of Justice? It just—doesn't that—

MS. VARGAS: Data is a different matter, your Honor. The underlying information and data we believe is included and there is—there is some allegation that the data that the [72] Census Bureau relied upon in generating analyses of the DOJ request was not included in the Administrative Record.

Now the summary of that analysis, in fact, is included in the Administrative Record. It is in the Abowd—two different Abowd memos that are part of the Administrative Record.

Raw data itself, the raw census data from which that analysis is generated is protected by law. It's confidential—

THE COURT: I don't mean the data but the analyses of those who are advising the Secretary on whether this is a good idea or bad idea.

MS. VARGAS: Well to the extent they are discussing pros and cons, analysis, recommendations, all of that would fall within the deliberative process privilege.

THE COURT: Why should that not be on a privilege log?

MS. VARGAS: Because, your Honor, courts have routinely held that privilege logs are not required in APA cases precisely because these documents are not part—

THE COURT: Didn't the Second Circuit say exactly the opposite in the DACA litigation out of the Eastern District?

MS. VARGAS: Respectfully no, your Honor, it did not. I believe you're talking about the Nielsen slip order in which they denied a writ of mandamus. So, first of all, we're talking about a denial of a writ of mandamus which, of course, [73] is reviewing the district court decision under an exceedingly high standard, whether or not there are extreme circumstances warranting overturning the district court's decision. Obviously, of course, it's also not a published opinion but an order of the court, it's nonbinding. But on the merits I do not believe that the Second Circuit stated that privilege logs are required. If you look at the district court order that's being reviewed in that case, the District Court had decided that on the facts of that case a privilege log was required because it had found that the government had acted in bad faith. So there was—it wasn't binding that in every APA case privilege logs are required. The District Court had said that in constructing the administrative record the agency had not included all of the documents that were directly or indirectly before the decision-maker. And in that specific circumstance

where there had been that history, it said that we are not affording the normal presumption of regularity to the government and it was going to require a privilege log. And the Second Circuit did not grant writ of mandamus to overturn that decision.

But it doesn't stand for a broader proposition that in all APA cases privilege logs are required. The vast weight of authority is, in fact, to the contrary. Because these documents are not part of an administrative record in the first place, you don't log them; just as in civil discovery, if a [74] document is not responsive to a document request, you don't put it on a privilege log. The same principle applies in this case.

THE COURT: All right. Anything else you want to say?

MS. VARGAS: Yes, your Honor. I did want to address a couple of points on the scope of discovery, particularly expert discovery. They are trying to take advantage of an exception that doesn't really apply to have broad expert discovery in a case when the Second Circuit in Sierra Club has specifically said it is error for a district court in an APA case to allow experts to opine and to challenge the propriety of an agency decision.

THE COURT: Well, the way I read Sierra Club it doesn't speak to whether expert discovery should be authorized in the first instance. It speaks to the deference owed to the agency and whether a court can rely on an expert—expert evidence in order to supplant or disregard the agency's opinion. But that's a merits question. It's not a question pertaining to discovery.

MS. VARGAS: I disagree, your Honor. I think what the Second Circuit said is that expert discovery

—extra record, expert discovery for the purposes of challenging the agency's expert analysis is absolutely error and should not be allowed because of the fact that record review in an APA case under Supreme Court precedent, Camp v. Pitts, it must be confined to [75] the record.

THE COURT: What if the bad faith exception applies?

MS. VARGAS: Well the bad faith exception, of course, is a separate exception. Specific to the expert point.

THE COURT: But my question is that if I find that the presumption of regularity has been rebutted and the bad faith exception applies, does that not open the door to expert discovery, putting aside the ultimate question of whether and to what extent I could rely on that expert discovery or evidence in terms of evaluating the Secretary's decision?

MS. VARGAS: No, your Honor. Because the exceptions for the record review rule are to be narrowly construed. So to the extent that your Honor found that there was bad faith, which we obviously contest and don't believe extra record discovery is appropriate here, but if the Court were to find that, then the discovery had to be narrowly tailored to the points on which you found that there was some allegation of bad faith. So, for example, if there was a very specific issue that your Honor thought needed to be developed that perhaps could be ordered but it wouldn't open the door up to make this just a regular civil litigation under Rule 26 with broad discovery allowed on all claims on all issues and any expert discovery they wanted. It

doesn't open the door that wide. It just has to be narrowed to the specific point on which you find. But, of course, the government does not concede, it does [76] not believe that discovery would be appropriate in this case.

THE COURT: I understand.

MS. VARGAS: Thank you, your Honor.

THE COURT: All right. I was largely prepared to rule on the discovery question based on the papers and nothing I've heard from counsel has altered my view so I am prepared to give you my ruling on that front.

In doing so, I am of course mindful of the Supreme Court's decision In re United States, 138 S. Ct. 443 (2017) (per curiam), holding in connection with lawsuits challenging the rescission of DACA that the district court should have resolved the government's threshold arguments before deciding whether to authorize discovery—on the theory that the threshold arguments, "if accepted, likely would eliminate the need for the district court to examine a complete Administrative Record." That is from page 445 of that decision. I do not read that decision, however, to deprive me of the broad discretion that district courts usually have in deciding whether and when to authorize discovery despite a pending motion to dismiss; indeed, the Supreme Court's decision was expressly limited to "the specific facts" of the case before it. That's from the same page. More to the point, several considerations warrant a different approach here. First, unlike the DACA litigation, this case does not arise in the immigration and national security context, where the [77] Executive Branch enjoys broad, indeed arguably broadest authority. Second, time is of the essence here given that the clock is running on

census preparations. If this case is to be resolved with enough time to seek appellate review, whether interlocutory or otherwise, it is essential to proceed on parallel tracks. Third, and most substantially, unlike the DACA litigation, defendants' threshold argument here are fully briefed, at least in the states' case. See Regents of University of California v. U.S. Department of Homeland Security, 279 F. Supp. 3d 1011, at 1028 (N.D. Cal. 2018) discussing the procedural history of the DACA litigation and making clear that the motion to dismiss was not filed at the time that discovery was authorized. Although I reserve judgment on those threshold arguments, and I should make clear that I am reserving judgment on the motion to dismiss at this time, I am sufficiently confident, having read the parties' briefs and heard the oral argument today that the state and city plaintiffs' claims will survive, at least in part, to warrant proceeding on the discovery front. Moreover, I hope to issue a decision on the threshold issues in short order. So in the unlikely event that I do end up dismissing plaintiffs' case in its entirety, it is unlikely that defendants will have been heavily burdened in the interim.

With that, let me turn to the three broad categories of additional discovery that plaintiffs in the two cases have [78] sought in their letters of June 26, namely, a privilege log for all materials withheld from the record on the basis of privilege; completion of the previously filed Administrative Record; and extra record discovery. See docket no. 193 in the states' case, that is plaintiffs' letter in that case. For reasons I will explain, I find that plaintiffs have the better of the argument on all three fronts. I will address each in turn

and then turn to the scope and timing of discovery that I will allow.

The first issue whether defendants need to produce a privilege log is easily resolved. Put simply, defendants' arguments are, in my view, squarely foreclosed by the Second Circuit's December 17, 2017 rejection of similar arguments In re Nielsen. That is docket no. 17-3345 (2d Cir. December 27 or 17, I think, 2017). That is the DACA litigation pending in the Eastern District of New York. I recognize, of course, that that was —it arises in a mandamus petition and it is unpublished, but I think the reasons articulated by the Court of Appeals counsel for the production of a privilege log here. If anything, the justifications for requiring production of a privilege log are stronger here as the underlying documents do not implicate matters of immigration or national security and the burdens would appear to be substantially less significant or at least defendants have not articulated a particularly onerous burden. Moreover, whereas the defendants in Nielsen [79] had at least identified some basis for asserting privilege, namely the deliberative process privilege, defendants here, at least until the argument a moment ago, did not provide any such basis. See the states' letter at page two, note three. Accordingly, defendants must produce a privilege log identifying with specificity the documents that have been withheld from the Administrative Record and, for each document, the asserted privilege or privileges.

Second, plaintiffs seek an order directing the government to complete the Administrative Record. Although an agency's designation of the Administrative Record is generally afforded a presumption of regularity,

that presumption can be rebutted where the seeking party shows that "materials exist that were actually considered by the agency decision-makers but are not in the record as filed." Comprehensive Community Development Corp. v. Sebelius, 890 F. Supp. 2d 305, 309 (S.D.N.Y. 2012). Plaintiffs have done precisely that here.

In his March 2018 decision memorandum produced in the Administrative Record at page 1313, Secretary Ross stated that he "set out to take a hard look" at adding the citizenship question "following receipt" of a request from the Department of Justice on December 12, 2017. Additionally, in sworn testimony before the House Ways and Means Committee, of which I can take judicial notice, see, for example, Ault v. J. M. Smucker Company, 2014 WL 1998235 at page 2 (S.D.N.Y. May 15, [80] 2014), Secretary Ross testified under oath that the Department of Justice had "initiated the request for inclusion of the citizenship question." See the states' letter at page four. It now appears that those statements were potentially untrue. On June 21, this year, without explanation, defendants filed a supplement to the Administrative Record, namely a half-page memorandum from Secretary Ross, also dated June 21, 2018. That appears at docket no. 189 in the states' case. In this memorandum, Secretary Ross stated that "soon after" his appointment as Secretary, which occurred in February of 2017, almost ten months before the request from the Department of Justice, he "began considering" whether to add the citizenship question and that "as part of that deliberative process," he and his staff "inquired whether the department of justice would support, and if so would request, inclusion of a citizenship question." In other words, it now appears that the idea of adding the citizenship question originated with

Secretary Ross, not the Department of Justice and that its origins long predated the December 2017 letter from the Justice Department. Even without that significant change in the timeline, the absence of virtually any documents predating DOJ's December 2017 letter was hard to fathom. But with it, it is inconceivable to me that there aren't additional documents from earlier in 2017 that should be made part of the Administrative Record.

[81] That alone would warrant an order to complete the Administrative Record. But, compounding matters, the current record expressly references documents that Secretary Ross claims to have considered but which are not themselves a part of the Administrative Record. For example, Secretary Ross claims that "additional empirical evidence about the impact of sensitive questions on the survey response rates came from the Senior Vice-President of Data Science at Nielsen." That's page 1318 of the record. But the record contains no empirical evidence from Nielsen. Additionally, the record does not include documents relied upon by subordinates, upon whose advice Secretary Ross plainly relied in turn. For example, Secretary Ross's memo references "the department's review" of inclusion of the citizenship question, and advice of "Census Bureau staff." That's pages 1314, 1317, and 1319. Yet the record is nearly devoid of materials from key personnel at the Census Bureau or Department of Commerce—apart from two memoranda from the Census Bureau's chief scientist which strongly recommend that the Secretary not add a citizenship question. Pages 1277 and 1308. The Administrative Record is supposed to include "materials that the agency decision-maker indirectly or constructively considered." Batalla Vidal

v. Duke, 2017 WL 4737280 at page 5 (E.D.N.Y. October 19, 2017).

Here, for the reasons that I've stated, I conclude that the current Administrative Record does not include the [82] full scope of such materials. Accordingly, plaintiffs' request for an order directing defendants to complete the Administrative Record is well founded.

Finally, I agree with the plaintiffs that there is a solid basis to permit discovery of extra-record evidence in this case. To the extent relevant here, a court may allow discovery beyond the record where "there has been a strong showing in support of a claim of bad faith or improper behavior on the part of agency decision-makers." National Audubon Society v. Hoffman, 132 F.3d 7, 14 (2d Cir. 1997). Without intimating any view on the ultimate issues in this case, I conclude that plaintiffs have made such a showing here for several reasons.

First, Secretary Ross's supplemental memorandum of June 21, which I've already discussed, could be read to suggest that the Secretary had already decided to add the citizenship question before he reached out to the Justice Department; that is, that the decision preceded the stated rationale. See, for example, Tummino v. von Eschenbach, 427 F. Supp. 2d 212, 233 (E.D.N.Y. 2006) authorizing extra-record discovery where there was evidence that the agency decision-makers had made a decision and, only thereafter took steps "to find acceptable rationales for the decision." Second, the Administrative Record reveals that Secretary Ross overruled senior Census Bureau career staff, who had concluded —and this is at page [83] 1277 of the record—that reinstating the citizenship question would be "very costly"

and "harm the quality of the census count." Once again, see Tummino, 427 F. Supp. 2d at 231-32, holding that the plaintiffs had made a sufficient showing of bad faith where "senior level personnel overruled the professional staff." Third, plaintiffs' allegations suggest that defendants deviated significantly from standard operating procedures in adding the citizenship question. Specifically, plaintiffs allege that, before adopting changes to the questionnaire, the Census Bureau typically spends considerable resources and time—in some instances up to ten years—testing the proposed changes. See the amended complaint which is docket no. 85 in the states' case at paragraph 59. Here, by defendants' own admission—see the amended complaint at paragraph 62 and page 1313 of the Administrative Record—defendants added an entirely new question after substantially less consideration and without any testing at all. Yet again Tummino is instructive. See 427 F. Supp. 2d at 233, citing an "unusual" decision-making process as a basis for extra-record discovery.

Finally, plaintiffs have made at least a prima facie showing that Secretary Ross's stated justification for reinstating the citizenship question—namely, that it is necessary to enforce Section 2 of the Voting Rights Act—was pretextual. To my knowledge, the Department of Justice and [84] civil rights groups have never, in 53 years of enforcing Section 2, suggested that citizenship data collected as part of the decennial census, data that is by definition quickly out of date, would be helpful let alone necessary to litigating such claims. See the states case docket no. 187-1 at 14; see also paragraph 97 of the amended complaint. On top of that, plaintiffs' allegations that the current Department of Justice has shown little interest in enforcing the Voting Rights Act

casts further doubt on the stated rationale. See paragraph 184 of the complaint which is docket no. 1 in the Immigration Coalition case. Defendants may well be right that those allegations are "meaningless absent a comparison of the frequency with which past actions have been brought or data on the number of investigations currently being undertaken," and that plaintiffs may fail "to recognize the possibility that the DOJ's voting-rights investigations might be hindered by a lack of citizenship data." That is page 5 of the government's letter which is docket no. 194 in the states case. But those arguments merely point to and underscore the need to look beyond the Administrative Record.

To be clear, I am not today making a finding that Secretary Ross's stated rationale was pretextual —whether it was or wasn't is a question that I may have to answer if or when I reach the ultimate merits of the issues in these cases. Instead, the question at this stage is merely whether— [85] assuming the truth of the allegations in their complaints—plaintiffs have made a strong preliminary or prima facie showing that they will find material beyond the Administrative Record indicative of bad faith. See, for example, Ali v. Pompeo, 2018 WL 2058152 at page 4 (E.D.N.Y. May 2, 2018). For the reasons I've just summarized, I conclude that the plaintiffs have done so.

That brings me to the question of scope. On that score, I am mindful that discovery in an APA action, when permitted, "should not transform the litigation into one involving all the liberal discovery available under the federal rules. Rather, the Court must permit only that discovery necessary to effectuate the Court's judicial

review; i.e., review the decision of the agency under Section 706." That is from Ali v. Pompeo at page 4, citing cases. I recognize, of course, that plaintiffs argue that they are independently entitled to discovery in connection with their constitutional claims. I'm inclined to disagree given that the APA itself provides for judicial review of agency action that is "contrary to" the Constitution. See, for example, Chang v. USCIS, 254 F. Supp. 3d 160 at 161-62 (D.D.C. 2017). But, even if plaintiffs are correct on that score, it is well within my authority under Rule 26 to limit the scope of discovery.

Mindful of those admonitions, not to mention the separation of powers principles at stake here, I am not [86] inclined to allows as much or as broad discovery as the plaintiffs seek, at least in the first instance. First, absent agreement of defendants or leave of Court, of me, I will limit plaintiffs to ten fact depositions. To the extent that plaintiffs seek to take more than that, they will have to make a detailed showing in the form of a letter motion, after conferring with defendants, that the additional deposition or depositions are necessary. Second, again absent agreement of the defendants or leave of Court, I will limit discovery to the Departments of Commerce and Justice. As defendants' own arguments make clear, materials from the Department of Justice are likely to shed light on the motivations for Secretary Ross's decision—and were arguably constructively considered by him insofar as he has cited the December 2017 letter as the basis for his decision. At this stage, however, I am not persuaded that discovery from other third parties would be necessary or appropriate; to the extent that third parties may have influenced Secretary Ross's decision, one would assume that that influence would be evidenced in Commerce

Department materials and witnesses themselves. Further, to the extent that plaintiffs would seek discovery from the White House, including from current and former White House officials, it would create "possible separation of powers issues." That is from page 4 of the slip opinion in the Nielsen order. Third, although I suspect there will be a strong case for allowing a [87] deposition of Secretary Ross himself, I will defer that question to another day. For one thing, I think it should be the subject of briefing in and of itself. It raises a number of thorny issues. For another, I'm inclined to think that plaintiffs should take other depositions before deciding whether they need or want to go down that road and bite off that issue recognizing, among other things, that defendants have raised the specter of appellate review in the event that I did allow it. At the same time, I want to make sure that I have enough time to decide the issue and to allow for the possibility of appellate review without interfering with an expeditious schedule. So on that issue I'd like you to meet and confer with one another and discuss a timeline and a way of raising the issue, that is to say, when it is both ripe but also timely and would allow for an orderly resolution.

So with those limitations, I will allow plaintiffs to engage in discovery beyond the record. Further, I will allow for expert discovery. Expert testimony would seem to be commonplace in cases of this sort. See, for example, Cuomo v. Baldrige, 674 F. Supp. 1089 (S.D.N.Y. 1987). And as I indicated in my colloquy with Ms. Vargas, I do not read Sierra v. United States Army Corps of Engineers, 772 F.2d 1043 (2d Cir. 1985), to "prohibit" expert discovery as defendants suggestion. That case, in my view, speaks the deference that a court ulti-

mately owes the agency's own expert analyses, but it does not speak to [88] the propriety of expert discovery, let alone clearly prohibit such discovery, let alone do so in a case where, as I have just done so, a finding of bad faith and a rebuttal of the presumption of regularity are at issue.

That leaves only the question of timing. I recognize that you proposed schedules without knowing the scope of discovery that I would permit. I would like to set a schedule today. In that regard, would briefly hear from both sides with respect to the schedule. Alternatively, I could allow you to meet and confer and propose a schedule in writing if you think that that would be more helpful. Let me facilitate the discussion by throwing out a proposed schedule which is based in part on your letters and modifications that I've made to the scope of discovery.

First, by July 16, I think defendants should produce the complete record as well as a privilege log and initial disclosures. I recognize that Rule 26(a)(1)(B)(i) exempts from initial disclosure "an action for review on an administrative record" but in light of my decision allowing extra-record discovery I do not read that exception to apply.

Then I would propose that by September 7, plaintiffs will disclose their expert reports.

By September 21, defendants will disclose their expert reports, if any.

By October 1, plaintiffs will disclose any rebuttal [89] expert reports.

And fact an expert discovery would close by October 12, 2018.

Plaintiffs also propose that the parties would then be ready for trial on October 31. My view is it's premature to talk about having a trial. For one thing, it may well end up making sense to proceed by way of summary judgment rather than trial. For another thing, I don't know if we need to build in time for Daubert motions or other pretrial motions that would require more than 19 days to brief and for me to decide. I would be inclined, instead, to schedule a status conference for sometime in September to check in on where things stand, making sure that things are proceeding apace and get a sense of what is coming down the pike and decide how best to proceed. Having said that, I think it would make sense for you guys to block time in late October and November in the event that I do decide a trial is warranted. Again, I am mindful that my word is not likely to be the final one here and I want to make sure that all sides have an adequate opportunity to seek whatever review they would need to seek after a final decision.

So that's my ruling. You can respond to my proposed schedule. I'd be inclined to set it today but if you think you need additional time.

MR. FREEDMAN: Your Honor, John Freedman. Just one clarification. I think it was clear from what you said but in [90] terms of the number of depositions you meant ten collectively between the two cases, not ten per case?

THE COURT: Correct. And they would be cross-designated or cross-referenced in both cases. Correct.

MR. FREEDMAN: Understood, your Honor.

THE COURT: And, again, I don't mean to suggest that you will get more, but that's not—I did invite you to make a showing with specificity for why additional depositions would be needed. If it turns out that it is warranted, I'm prepared to allow it but, mindful of the various principles at stake and the limited scope of review under the APA, I think that it makes sense to rein discovery in in a way that it wouldn't be a standard civil action.

So, thoughts?

MR. COLANGELO: Your Honor, for the state and local government plaintiffs, we have no concerns at all.

THE COURT: Microphone, please.

MR. COLANGELO: For the state and local government plaintiffs, we have no concerns at all with the various deadlines that the Court has set out. Thank you.

MR. FREEDMAN: Your Honor, for the NYIC plaintiffs we concur. We think that it sets an appropriately expedited schedule that will resolve the issues in time and we appreciate the expedited consideration.

THE COURT: All right. Defendants.

[91] MS. BAILEY: Your Honor, I have a couple clarifying questions. As far as the proposed July 16 deadline, you say completing the record would that be the same deadline you envision for the privilege log?

THE COURT: Yes.

MS. BAILEY: We would ask that the schedule we have already set in other actions, that we have a little bit more time for that initial deadline. We have a num-

ber of briefs and an argument coming up that same week. Could we push that back until a bit later in July?

THE COURT: And when you say "that," meaning the deadline for initial disclosures, completing the record, and the log or only a part of those?

MS. BAILEY: Yes, your Honor. All—it would make sense I think to do them all together. But it would—we'd like to move that a little later in July.

THE COURT: Well I don't want to move it too much later in July because it will backup everything else. Why don't I give you until July 23. I would imagine that that would not materially affect the remainder of the schedule and would give you an extra week. Next.

MS. BAILEY: Thank you, your Honor.

One other point. In the conference before Judge Seeborg, Judge Seeborg, as your Honor is aware, he reserved the issue of deciding whether discovery was warranted. But as I [92] understand it, he strongly indicated that he thought that—if discovery is warranted in different actions, that the plaintiffs should coordinate between those actions and asked for the views of the parties on how that coordination should take place. So he didn't ultimately rule on that but we agree that coordinate between parties, if discovery is ordered in the other cases, is warranted.

THE COURT: I agree wholeheartedly. And Judge Seeborg knows as well, I did talk to him, as I mentioned. He indicated that he had reserved judgment but indicated that he, I think, would probably be ruling on or before August 10, I think; and that it was his view that if discovery were to go forward, it should be coordinated with discovery here if I were to allow it.

I agree. Ultimately I don't see why any of the folks who would be subjected to a deposition should be deposed twice in multiple actions. How to accomplish that, I don't have a settled idea on at the moment, but I would think that either you all should go back to Judge Seeborg and say in light of Judge Furman's decision we're prepared to proceed here or at least enter some sort of stipulation in that action that would allow for participation of counsel in the depositions—I'm open to suggestions. I mean I think that counsel in all of these cases having a conversation and figuring out an orderly way to proceed is probably sensible. I will call Judge Hazel [93] but I imagine that all of the judges involved will be of the view that depositions should only be taken once and certainly if they are depositions of upper level officials those are definitely only going to happen once. So I think coordination is going to be necessary.

Another component of that is that I imagine there may be discovery disputes in this case, and I don't have a brilliant idea for how those get resolved, whether they get resolved by me, by Judge Seeborg, or by Judge Hazel if discovery is allowed there. I think for now they should come to me because I'm the one and only judge who has ruled on the issue. But in the event that the other judges do authorize discovery, we probably need an orderly system to resolve those issues. I don't want it to be like a child who goes to mom and doesn't get the answer that he wants and then goes to dad for reconsideration. So I think you all should give some thought to that. Again, I don't think it needs to be resolved right now because Judge Seeborg has reserved judgment on it, but I will give it some thought, as I imagine he will, and we'll talk about it.

Anything you all want to say on that score?

MR. COLANGELO: Your Honor, for the state and local government plaintiffs, I would just add that we have no objection to coordinating with plaintiffs in other cases on the timing of depositions or on their participation, if warranted. [94] Our key concern was in not having the latest decided case be the right limiting step. We think the appropriate course is the one you've taken. So assuming it's on the schedule that your Honor has proposed, we have no objection to other—to coordinating with other plaintiffs on deposition schedules in particular.

THE COURT: I don't intend to wait for the other courts. I'm sure that they will be proceeding expeditiously in their own cases, but I am trying to get this case resolved in a timely fashion and in that regard don't plan to wait. So it behooves all of you to get on the phone with one another and figure out some sort of means of coordinating. You can look—I have a coordination order in the GM MDL that might provide a model and that allows for counsel in different cases to participation in depositions. This is not an MDL but there are some similarities. You may want to consider that. I'm sure there are other contexts in which these issues have arisen and you may want to look at models.

What I propose is why don't you submit a joint letter to me from all counsel in these cases, let's say within two weeks after you've had an opportunity to both confer with one another and confer with counsel in the other cases, and submit a joint letter to me with some sort of proposal. And if you can agree upon an order that would apply and ensure smooth coordination, all the better; and if not, you can tell me what

[95] your counterproposals are and I'll consider it at that time. All right.

MS. BAILEY: Thank you, your Honor.

THE COURT: Very good. Anything else?

MR. COLANGELO: Nothing for us, your Honor.

THE COURT: I wanted to just give you one heads-up. I noted from the states and local governments' letter there is an attachment which is a letter with respect to the Touhy issues in the case. As it happens, I have another case where that or some of the issues raised in that letter are actually fully submitted before me in an APA action case called Koopman v. U.S. Department of Transportation, 18 CV 3460. That matter is fully submitted. I can't and won't make any promises to you with respect to when I will issue a decision in it but it may speak to some of the issues raised in the states and local governments' letter. So you may want to keep an eye out for it.

With that—

MS. VARGAS: Your Honor, I do believe that we have—we are not going to be resting on a former employee issue which I believe is the issue in the Koopman litigation. So I don't believe that will implicate the issues that are at play in that case.

THE COURT: Good. Good to know. Thank you for letting me know. Then you don't need to look for it unless you [96] have some strange desire to read Judge Furman decisions.

On that score let me say I will try to issue a decision on the motion to dismiss in short order. I don't want to give myself a deadline. That's one prerogative of

being in my job. But I do hope that I'll get it out in the next couple weeks. And it's been very helpful, the argument this morning was very helpful, and counsel did an excellent job and your briefing is quite good as well as the amicus briefing. So I appreciate that. I will reserve judgment. I wish everybody a very happy Fourth of July. We are adjourned.

(Adjourned)

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

State of New York, et al.

(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

U.S. Department of Commerce, et al.

(List the full name(s) of the defendant(s)/respondent(s).)

18 CV 2921 (JMF)(
18 CV 5025 (JMF)

NOTICE OF APPEAL

Notice is hereby given that the following parties: All Defendants

(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit

from the ☒ judgment ☒ order entered on: January 15, 2019

(date that judgment or order was entered on docket)

that: ECF Nos. 574 & 575 (No. 18-cv-2921); ECF Nos. 166 & 167 (No. 18-cv-5025)

(If the appeal is from an order, provide a brief description above of the decision in the order.)

January 17, 2019 — Dated

/s/ Garrett Coyle — Signature*

Coyle, Garrett

Name (Last, First, MI)

1100 L Street NW — Address

Washington — City

DC — State

20005 — Zip Code

(202) 616-8016 — Telephone Number

garrett.coyle@usdoj.gov — E-mail Address (if available)

* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

Rev. 12/26/13

APPENDIX G

1. U.S. Const. Art. I, § 2, Cl. 3 provides in pertinent part:

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers * * * . The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.

* * * * *

2. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

3. 13 U.S.C. 2 provides:

Bureau of the Census

The Bureau is continued as an agency within, and under the jurisdiction of, the Department of Commerce.

4. 13 U.S.C. 4 provides:

Functions of Secretary; regulations; delegation

The Secretary shall perform the functions and duties imposed upon him by this title, may issue such rules and regulations as he deems necessary to carry out such functions and duties, and may delegate the performance of such functions and duties and the authority to issue such rules and regulations to such officers and

employees of the Department of Commerce as he may designate.

5. 13 U.S.C. 5 provides:

Questionnaires; number, form, and scope of inquiries

The Secretary shall prepare questionnaires, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.

6. 13 U.S.C. 6 provides:

Information from other Federal departments and agencies; acquisition of reports from other governmental and private sources

(a) The Secretary, whenever he considers it advisable, may call upon any other department, agency, or establishment of the Federal Government, or of the government of the District of Columbia, for information pertinent to the work provided for in this title.

(b) The Secretary may acquire, by purchase or otherwise, from States, counties, cities, or other units of government, or their instrumentalities, or from private persons and agencies, such copies of records, reports, and other material as may be required for the efficient and economical conduct of the censuses and surveys provided for in this title.

(c) To the maximum extent possible and consistent with the kind, timeliness, quality and scope of the statistics required, the Secretary shall acquire and use information available from any source referred to

in subsection (a) or (b) of this section instead of conducting direct inquiries.

7. 13 U.S.C. 141 provides in pertinent part:

Population and other census information

(a) The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date", in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

* * * * *

(f) With respect to each decennial and mid-decade census conducted under subsection (a) or (d) of this section, the Secretary shall submit to the committees of Congress having legislative jurisdiction over the census—

(1) not later than 3 years before the appropriate census date, a report containing the Secretary's determination of the subjects proposed to be included, and the types of information to be compiled, in such census;

(2) not later than 2 years before the appropriate census date, a report containing the Secretary's determination of the questions proposed to be included in such census; and

(3) after submission of a report under paragraph (1) or (2) of this subsection and before the appropriate census date, if the Secretary finds new

circumstances exist which necessitate that the subjects; types of information, or questions contained in reports so submitted be modified, a report containing the Secretary's determination of the subjects, types of information, or questions as proposed to be modified.

* * * * *

8. 13 U.S.C. 221 provides:

Refusal or neglect to answer questions; false answers

(a) Whoever, being over eighteen years of age, refuses or willfully neglects, when requested by the Secretary, or by any other authorized officer or employee of the Department of Commerce or bureau or agency thereof acting under the instructions of the Secretary or authorized officer, to answer, to the best of his knowledge, any of the questions on any schedule submitted to him in connection with any census or survey provided for by subchapters I, II, IV, and V of chapter 5 of this title, applying to himself or to the family to which he belongs or is related, or to the farm or farms of which he or his family is the occupant, shall be fined not more than $100.

(b) Whoever, when answering questions described in subsection (a) of this section, and under the conditions or circumstances described in such subsection, willfully gives any answer that is false, shall be fined not more than $500.

(c) Notwithstanding any other provision of this title, no person shall be compelled to disclose information rela-

tive to his religious beliefs or to membership in a religious body.

APPENDIX H

UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

Supplemental Memorandum by Secretary of Commerce Wilbur Ross Regarding the Administrative Record in Census Litigation

This memorandum is intended to provide further background and context regarding my March 26, 2018, memorandum concerning the reinstatement of a citizenship question to the decennial census. Soon after my appointment as Secretary of Commerce, I began considering various fundamental issues regarding the upcoming 2020 Census, including funding and content. Part of these considerations included whether to reinstate a citizenship question, which other senior Administration officials had previously raised. My staff and I thought reinstating a citizenship question could be warranted, and we had various discussions with other governmental officials about reinstating a citizenship question to the Census. As part of that deliberative process, my staff and I consulted with Federal governmental components and inquired whether the Department of Justice (DOJ) would support, and if so would request, inclusion of a citizenship question as consistent with and useful for enforcement of the Voting Rights Act.

Ultimately, on December 12, 2017, DOJ sent a letter formally requesting that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship. My March 26, 2018, memorandum described the thorough assessment process that the Department

of Commerce conducted following receipt of the DOJ letter, the evidence and arguments I considered, and the factors I weighed in making my decision to include the citizenship question on the 2020 Census.

/s/ WILBUR ROSS
WILBUR ROSS
June 21, 2018

APPENDIX I

UNITED STATES DEPARTMENT OF COMMERCE
The Secretary of Commerce
Washington, D.C. 20230

To: Karen Dunn Kelley, Under Secretary for Economic Affairs

From: Secretary Wilbur Ross

Date: Mar. 26, 2018

Re: Reinstatement of a Citizenship Question on the 2020 Decennial Census Questionnaire

Dear Under Secretary Kelley:

As you know, on December 12, 2017, the Department of Justice ("DOJ") requested that the Census Bureau reinstate a citizenship question on the decennial census to provide census block level citizenship voting age population ("CVAP") data that are not currently available from government survey data ("DOJ request"). DOJ and the courts use CVAP data for determining violations of Section 2 of the Voting Rights Act ("VRA"), and having these data at the census block level will permit more effective enforcement of the Act. Section 2 protects minority population voting rights.

Following receipt of the DOJ request, I set out to take a hard look at the request and ensure that I considered all facts and data relevant to the question so that I could make an informed decision on how to respond. To that end, the Department of Commerce ("Department") immediately initiated a comprehensive review process led by the Census Bureau.

The Department and Census Bureau's review of the DOJ request—as with all significant Census assessments—prioritized the goal of obtaining *complete and accurate data.* The decennial census is mandated in the Constitution and its data are relied on for a myriad of important government decisions, including apportionment of Congressional seats among states, enforcement of voting rights laws, and allocation of federal funds. These are foundational elements of our democracy, and it is therefore incumbent upon the Department and the Census Bureau to make every effort to provide a complete and accurate decennial census.

At my direction, the Census Bureau and the Department's Office of the Secretary began a thorough assessment that included legal, program, and policy considerations. As part of the process, I also met with Census Bureau leadership on multiple occasions to discuss their process for reviewing the DOJ request, their data analysis, my questions about accuracy and response rates, and their recommendations. At present, the Census Bureau leadership are all career civil servants. In addition, my staff and I reviewed over 50 incoming letters from stakeholders, interest groups, Members of Congress, and state and local officials regarding reinstatement of a citizenship question on the 2020 decennial census, and I personally had specific conversations on the citizenship question with over 24 diverse, well informed and interested parties representing a broad range of views. My staff and I have also monitored press coverage of this issue.

Congress has delegated to me the authority to determine which questions should be asked on the decennial census, and I may exercise my discretion to reinstate

the citizenship question on the 2020 decennial census, especially based on DOJ's request for improved CVAP data to enforce the VRA. By law, the list of decennial census questions is to be submitted two years prior to the decennial census—in this case, no later than March 31, 2018.

The Department's review demonstrated that collection of citizenship data by the Census has been a long-standing historical practice. Prior decennial census surveys of the entire United States population consistently asked citizenship questions up until 1950, and Census Bureau surveys of sample populations continue to ask citizenship questions to this day. In 2000, the decennial census "long form" survey, which was distributed to one in six people in the U.S., included a question on citizenship. Following the 2000 decennial census, the "long form" sample was replaced by the American Community Survey ("ACS"), which has included a citizenship question since 2005. Therefore, the citizenship question has been well tested.

DOJ seeks to obtain CVAP data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected, and DOJ states that the current data collected under the ACS are insufficient in scope, detail, and certainty to meet its purpose under the VRA. The Census Bureau has advised me that the census-block-level citizenship data requested by DOJ are not available using the annual ACS, which as noted earlier does ask a citizenship question and is the present method used to provide DOJ and the courts with data used to enforce Section 2 of the VRA. The ACS is sent on an annual basis to a sample of approximately 2.6 percent of the population.

To provide the data requested by DOJ, the Census Bureau initially analyzed three alternatives: Option A was to continue the status quo and use ACS responses; Option B was placing the ACS citizenship question on the decennial census, which goes to every American household; and Option C was not placing a question on the decennial census and instead providing DOJ with a citizenship analysis for the entire population using federal administrative record data that Census has agreements with other agencies to access for statistical purposes.

Option A contemplates rejection of the DOJ request and represents the status quo baseline. Under Option A, the 2020 decennial census would not include the question on citizenship that DOJ requested and therefore would not provide DOJ with improved CVAP data. Additionally, the block-group level CVAP data currently obtained through the ACS has associated margins of error because the ACS is extrapolated based on sample surveys of the population. Providing more precise block-level data would require sophisticated statistical modeling, and if Option A is selected, the Census Bureau advised that it would need to deploy a team of experts to develop model-based methods that attempt to better facilitate DOJ's request for more specific data. But the Census Bureau did not assert and could not confirm that such data modeling is possible for census-block-level data with a sufficient degree of accuracy. Regardless, DOJ's request is based at least in part on the fact that existing ACS citizenship data-sets lack specificity and completeness. Any future modeling from these incomplete data would only compound that problem.

Option A would provide no improved citizenship count, as the existing ACS sampling would still fail to obtain

actual, complete number counts, especially for certain lower population areas or voting districts, and there is no guarantee that data could be improved using small-area modeling methods. Therefore, I have concluded that Option A is not a suitable option.

The Census Bureau and many stakeholders expressed concern that **Option B**, which would add a citizenship question to the decennial census, would negatively impact the response rate for noncitizens. A significantly lower response rate by non-citizens could reduce the accuracy of the decennial census and increase costs for non-response follow up ("NRFU") operations. However, neither the Census Bureau nor the concerned stakeholders could document that the response rate would in fact decline materially. In discussing the question with the national survey agency Nielsen, it stated that it had added questions from the ACS on sensitive topics such as place of birth and immigration status to certain short survey forms without any appreciable decrease in response rates. Further, the former director of the Census Bureau during the last decennial census told me that, while he wished there were data to answer the question, none existed to his knowledge. Nielsen's Senior Vice President for Data Science and the former Deputy Director and Chief Operating Officer of the Census Bureau under President George W. Bush also confirmed that, to the best of their knowledge, no empirical data existed on the impact of a citizenship question on responses.

When analyzing Option B, the Census Bureau attempted to assess the impact that reinstatement of a citizenship question on the decennial census would have on response rates by drawing comparisons to ACS responses. How-

ever, such comparative analysis was challenging, as response rates generally vary between decennial censuses and other census sample surveys. For example, ACS self-response rates were 3.1 percentage points less than self-response rates for the 2010 decennial census. The Bureau attributed this difference to the greater outreach and follow-up associated with the Constitutionally-mandated decennial census. Further, the decennial census has differed significantly in nature from the sample surveys. For example, the 2000 decennial census survey contained only eight questions. Conversely, the 2000 "long form" sample survey contained over 50 questions, and the Census Bureau estimated it took an average of over 30 minutes to complete. ACS surveys include over 45 questions on numerous topics, including the number of hours worked, income information, and housing characteristics.

The Census Bureau determined that, for 2013-2016 ACS surveys, nonresponses to the citizenship question for non-Hispanic whites ranged from 6.0 to 6.3 percent, for non-Hispanic blacks ranged from 12.0 to 12.6 percent, and for Hispanics ranged from 11.6 to 12.3 percent. However, these rates were comparable to nonresponse rates for other questions on the 2013 and 2016 ACS. Census Bureau estimates showed similar nonresponse rate ranges occurred for questions on the ACS asking the number times the respondent was married, 4.7 to 6.9 percent; educational attainment, 5.6 to 8.5 percent; monthly gas costs, 9.6 to 9.9 percent; weeks worked in the past 12 months, 6.9 to 10.6 percent; wages/salary income, 8.1 to 13.4 percent; and yearly property insurance, 23.9 to 25.6 percent.

The Census Bureau also compared the self-response rate differences between citizen and noncitizen households' response rates for the 2000 decennial census short form (which did not include a citizenship question) and the 2000 decennial census long form survey (the long form survey, distributed to only one in six households, included a citizenship question in 2000). Census found the decline in self-response rates for noncitizens to be 3.3 percent greater than for citizen households. However, Census was not able to isolate what percentage of decline was caused by the inclusion of a citizenship question rather than some other aspect of the long form survey (it contained over six times as many questions covering a range of topics). Indeed, the Census Bureau analysis showed that for the 2000 decennial census there was a significant drop in self response rates overall between the short and long form; the mail response rate was 66.4 percent for the short form and only 53.9 percent for the long form survey. So while there is widespread belief among many parties that adding a citizenship question could reduce response rates, the Census Bureau's analysis did not provide definitive, empirical support for that belief.

Option C, the use of administrative records rather than placing a citizenship question on the decennial census, was a potentially appealing solution to the DOJ request. The use of administrative records is increasingly part of the fabric and design of modem censuses, and the Census Bureau has been using administrative record data to improve the accuracy and reduce the cost of censuses since the early 20th century. A Census Bureau analysis matching administrative records with the 2010 decennial census and ACS responses over several more recent years showed that using administra-

tive records could be more accurate than self-responses in the case of non-citizens. That Census Bureau analysis showed that between 28 and 34 percent of the citizenship self-responses for persons that administrative records show are non-citizens were inaccurate. In other words, when non-citizens respond to long form or ACS questions on citizenship, they inaccurately mark "citizen" about 30 percent of the time. However, the Census Bureau is still evolving its use of administrative records, and the Bureau does not yet have a complete administrative records data set for the entire population. Thus, using administrative records alone to provide DOJ with CVAP data would provide an incomplete picture. In the 2020 decennial census, the Census Bureau was able to match 88.6 percent of the population with what the Bureau considers credible administrative record data. While impressive, this means that more than 10 percent of the American population—some 25 million voting age people—would need to have their citizenship imputed by the Census Bureau. Given the scale of this number, it was imperative that another option be developed to provide a greater level of accuracy than either self-response alone or use of administrative records alone would presently provide.

I therefore asked the Census Bureau to develop a fourth alternative, **Option D**, which would combine Options B and C. Under Option D, the ACS citizenship question would be asked on the decennial census, and the Census Bureau would use the two years remaining until the 2020 decennial census to further enhance its administrative record data sets, protocols, and statistical models to provide more complete and accurate data. This approach would maximize the Census Bureau's ability to match the decennial census responses with adminis-

trative records. Accordingly, at my direction the Census Bureau is working to obtain as many additional Federal and state administrative records as possible to provide more comprehensive information for the population.

It is my judgment that Option D will provide DOJ with the most complete and accurate CVAP data in response to its request. Asking the citizenship question of 100 percent of the population gives each respondent the opportunity to provide an answer. This may eliminate the need for the Census Bureau to have to impute an answer for millions of people. For the approximately 90 percent of the population who are citizens, this question is no additional imposition. And for the approximately 70 percent of non-citizens who already answer this question accurately on the ACS, the question is no additional imposition since census responses by law may only be used anonymously and for statistical purposes. Finally, placing the question on the decennial census and directing the Census Bureau to determine the best means to compare the decennial census responses with administrative records will permit the Census Bureau to determine the inaccurate response rate for citizens and non-citizens alike using the entire population. This will enable the Census Bureau to establish, to the best of its ability, the accurate ratio of citizen to non-citizen responses to impute for that small percentage of cases where it is necessary to do so.

Consideration of Impacts I have carefully considered the argument that the reinstatement of the citizenship question on the decennial census would depress response rate. Because a lower response rate would lead to increased non-response follow-up costs and less accurate responses, this factor was an important consid-

eration in the decision-making process. I find that the need for accurate citizenship data and the limited burden that the reinstatement of the citizenship question would impose outweigh fears about a potentially lower response rate.

Importantly, the Department's review found that limited empirical evidence exists about whether adding a citizenship question would decrease response rates materially. Concerns about decreased response rates generally fell into the following two categories—distrust of government and increased burden. First, stakeholders, particularly those who represented immigrant constituencies, noted that members of their respective communities generally distrusted the government and especially distrusted efforts by government agencies to obtain information about them. Stakeholders from California referenced the difficulty that government agencies faced obtaining any information from immigrants as part of the relief efforts after the California wildfires. These government agencies were not seeking to ascertain the citizenship status of these wildfire victims. Other stakeholders referenced the political climate generally and fears that Census responses could be used for law enforcement purposes. But no one provided evidence that reinstating a citizenship question on the decennial census would materially decrease response rates among those who generally distrusted government and government information collection efforts, disliked the current administration, or feared law enforcement. Rather, stakeholders merely identified residents who made the decision not to participate regardless of whether the Census includes a citizenship question. The reinstatement of a citizenship question will not decrease the response rate of residents who

already decided not to respond. And no one provided evidence that there are residents who would respond accurately to a decennial census that did not contain a citizenship question but would not respond if it did (although many believed that such residents had to exist). While it is possible this belief is true, there is no information available to determine the number of people who would in fact not respond due to a citizenship question being added, and no one has identified any mechanism for making such a determination.

A second concern that stakeholders advanced is that recipients are generally less likely to respond to a survey that contained more questions than one that contained fewer. The former Deputy Director and Chief Operating Officer of the Census Bureau during the George W. Bush administration described the decennial census as particularly fragile and stated that any effort to add questions risked lowering the response rate, especially a question about citizenship in the current political environment. However, there is limited empirical evidence to support this view. A former Census Bureau Director during the Obama Administration who oversaw the last decennial census noted as much. He stated that, even though he believed that the reinstatement of a citizenship question would decrease response rate, there is limited evidence to support this conclusion. This same former director noted that, in the years preceding the decennial census, certain interest groups consistently attack the census and discourage participation. While the reinstatement of a citizenship question may be a data point on which these interest groups seize in 2019, past experience demonstrates that it is likely efforts to undermine the decennial census will occur again regardless of whether the decennial

census includes a citizenship question. There is no evidence that residents who are persuaded by these disruptive efforts are more or less likely to make their respective decisions about participation based specifically on the reinstatement of a citizenship question. And there are actions that the Census Bureau and stakeholder groups are taking to mitigate the impact of these attacks on the decennial census.

Additional empirical evidence about the impact of sensitive questions on survey response rates came from the SVP of Data Science at Nielsen. When Nielsen added questions on place of birth and time of arrival in the United States (both of which were taken from the ACS) to a short survey, the response rate was not materially different than it had been before these two questions were added. Similarly, the former Deputy Director and COO of the Census during the George W. Bush Administration shared an example of a citizenship-like question that he believed would negatively impact response rates but did not. He cited to the Department of Homeland Security's 2004 request to the Census Bureau to provide aggregate data on the number of Arab Americans by zip code in certain areas of the country. The Census Bureau complied, and Census employees, including the then-Deputy Director, believed that the resulting political firestorm would depress response rates for further Census Bureau surveys in the impacted communities. But the response rate did not change materially.

Two other themes emerged from stakeholder calls that merit discussion. First, several stakeholders who opposed reinstatement of the citizenship question did not appreciate that the question had been asked in some

form or another for nearly 200 years. Second, other stakeholders who opposed reinstatement did so based on the assumption that the data on citizenship that the Census Bureau collects through the ACS are accurate, thereby obviating the need to ask the question on the decennial census. But as discussed above, the Census Bureau estimates that between 28 and 34 percent of citizenship self-responses on the ACS for persons that administrative records show are non-citizens were inaccurate. Because these stakeholder concerns were based on incorrect premises, they are not sufficient to change my decision.

Finally, I have considered whether reinstating the citizenship question on the 2020 Census will lead to any significant monetary costs, programmatic or otherwise. The Census Bureau staff have advised that the costs of preparing and adding the question would be minimal due in large part to the fact that the citizenship question is already included on the ACS, and thus the citizenship question has already undergone the cognitive research and questionnaire testing required for new questions. Additionally, changes to the Internet Self-Response instrument, revising the Census Questionnaire Assistance, and redesigning of the printed questionnaire can be easily implemented for questions that are finalized prior to the submission of the list of questions to Congress.

The Census Bureau also considered whether non-response follow-up increases resulting from inclusion of the citizenship question would lead to increased costs. As noted above, this estimate was difficult to assess given the Census Bureau and Department's inability to determine what impact there will be on decennial cen-

sus survey responses. The Bureau provided a rough estimate that postulated that up to 630,000 additional households may require NRFU operations if a citizenship question is added to the 2020 decennial census. However, even assuming that estimate is correct, this additional ½ percent increase in NRFU operations falls well within the margin of error that the Department, with the support of the Census Bureau, provided to Congress in the revised Lifecycle Cost Estimate ("LCE") this past fall. That LCE assumed that NRFU operations might increase by 3 percent due to numerous factors, including a greater increase in citizen mistrust of government, difficulties in accessing the Internet to respond, and other factors.

Inclusion of a citizenship question on this country's decennial census is not new—the decision to collect citizenship information from Americans through the decennial census was first made centuries ago. The decision to include a citizenship question on a national census is also not uncommon. The United Nations recommends that its member countries ask census questions identifying both an individual's country of birth and the country of citizenship. *Principals and Recommendations for Population and Housing Censuses (Revision* 3), UNITED NATIONS 121 (2017). Additionally, for countries in which the population may include a large portion of naturalized citizens, the United Nations notes that, "it may be important to collect information on the method of acquisition of citizenship." *Id.* at 123. And it is important to note that other major democracies inquire about citizenship on their census, including Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain, and the United Kingdom, to name a few.

The Department of Commerce is not able to determine definitively how inclusion of a citizenship question on the decennial census will impact responsiveness. However, even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population outweighs such concerns. Completing and returning decennial census questionnaires is required by Federal law, those responses are protected by law, and inclusion of a citizenship question on the 2020 decennial census will provide more complete information for those who respond. The citizenship data provided to DOJ will be more accurate with the question than without it, which is of greater importance than any adverse effect that may result from people violating their legal duty to respond.

To conclude, after a thorough review of the legal, program, and policy considerations, as well as numerous discussions with the Census Bureau leadership and interested stakeholders, I have determined that reinstatement of a citizenship question on the 2020 decennial census is necessary to provide complete and accurate data in response to the DOJ request. To minimize any impact on decennial census response rates, I am directing the Census Bureau to place the citizenship question last on the decennial census form.

Please make my decision known to Census Bureau personnel and Members of Congress prior to March 31, 2018. I look forward to continuing to work with the Census Bureau as we strive for a complete and accurate 2020 decennial census.

CC: Ron Jarmin, performing the nonexclusive functions and duties of the Director of the Census Bureau

Enrique Lamas, performing the nonexclusive functions and duties of the Deputy Director of the Census Bureau

APPENDIX J

DEC-14-2017 17:51

[redacted]

P. 02/04

U.S. Department of Justice
Justice Management Division
Office of General Counsel
Washington, D.C. 20530

[Dec. 12 2017]

VIA CERTIFIED RETURN RECEIPT
7014 2120 0000 8064 4964

Dr. Ron Jarmin
Performing the Non-Exclusive Functions and Duties of the Director
U.S. Census Bureau
United States Department of Commerce
Washington, D.C. 20233-0001

Re: Request To Reinstate Citizenship Question On 2020 Census Questionnaire

Dear Dr. Jarmin:

The Department of Justice is committed to robust and evenhanded enforcement of the Nation's civil rights laws and to free and fair elections for all Americans. In furtherance of that commitment, I write on behalf of the Department to formally request that the Census Bureau reinstate on the 2020 Census questionnaire a question regarding citizenship, formerly included in the so-called "long form" census. This data is critical to the Department's enforcement of Section 2 of the Voting Rights Act and its important protections against racial discrimination in voting. To fully enforce those requirements, the Department needs a reliable calculation of the citizen voting-age population in localities

where voting rights violations are alleged or suspected. As demonstrated, below the decennial census questionnaire is the most appropriate vehicle for collecting that data, and reinstating a question on citizenship will best enable the Department of protect all American citizens' voting rights under Section 2.

The Supreme Court has held that Section 2 of the Voting Rights Act prohibits "vote dilution" by state and local jurisdictions engaged in redistricting, which can occur when a racial group is improperly deprived of a single-member district in which it could form a majority. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Multiple federal courts of appeals have held that, where citizenship rates are at issue in a vote-dilution case, citizen voting-age population is the proper metric for determining whether a racial group could constitute a majority in a single-member district. See, e.g., *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023-24 (5th Cir. 2009); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998); *Negrn v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990); see also *LULAC v. Perry*, 548 U.S. 399, 423-442 (2006) (analyzing vote-dilution claim by reference to citizen voting-age population).

The purpose of Section 2's vote-dilution prohibition "is to facilitate participation . . . in our political process" by preventing unlawful dilution of the vote on the basis of race. *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997). Importantly, "[t]he plain language of section 2 of the Voting Rights Act makes clear that its

protections apply to United States citizens." *Id.* Indeed, courts have reasoned that "[t]he right to vote is one of the badges of citizenship" and that "[t]he dignity and very concept of citizenship are diluted if noncitizens are allowed to vote." *Barnett*, 141 F.3d at 704. Thus, it would be the wrong result for a legislature or a court to draw a single-member district in which a numerical racial minority group in a jurisdiction was a majority of the total voting-age population in that district but "continued to be defeated at the polls" because it was not a majority of the citizen voting-age population. *Campos*, 113 F.3d at 548.

These cases make clear that, in order to assess and enforce compliance with Section 2's protection against discrimination in voting the Department needs to be able to obtain citizen voting-age population data for census blocks, block groups, counties, towns, and other locations where potential Section 2 violations are alleged or suspected. From 1970 to 2000, the Census Bureau included a citizenship question on the so-called "long form" questionnaire that it sent to approximately one in every six households during each decennial census. See, e.g., U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Appendix B at B-7 (July 2007), *available at* https://www.census.gov/prod/cen2000/doc/sf3.pdf (last visited Nov. 22, 2017); U.S. Census Bureau, Index of Questions, *available at* https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Nov. 22, 2017). For years, the Department used the data collected in response to that question in assessing compliance with Section 2 and in litigation to enforce Section 2's protections against racial discrimination in voting.

In the 2010 Census, however, no census questionnaire included a question regarding citizenship. Rather, following the 2000 Census, the Census Bureau discontinued the "long form" questionnaire and replaced it with the American Community Survey (ACS). The ACS is a sampling survey that is sent to only around one in every thirty-eight households each year and asks a variety of questions regarding demographic information, including citizenship. See U.S. Census Bureau, *American Community Survey Information Guide at* 6, *available at* https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS Information Guide.pdf (last visited Nov. 22, 2017). The ACS is currently the Census Bureau's only survey that collects information regarding citizenship and estimates citizen voting-age population.

The 2010 redistricting cycle was the first cycle in which the ACS estimates provided the Census Bureau's only citizen voting-age population data. The Department and state and local jurisdictions therefore have used those ACS estimates for this redistricting cycle. The ACS, however, does not yield the ideal data for such purposes for several reasons:

- Jurisdictions conducting redistricting, and the Department in enforcing Section 2, already use the total population data from the census to determine compliance with the Constitution's one-person, one-vote requirement, see *Evenwel* v. *Abbott*, 136 S. Ct. 1120 (Apr. 4, 2016). As a result, using the ACS citizenship estimates means relying on two different data sets, the scope and level of detail of which vary quite significantly.

- Because the ACS estimates are rolling and aggregated into one-year, three-year, and five-year estimates, they do not align in time with the decennial census data. Citizenship data from the decennial census, by contrast, would align in time with the total and voting-age population data from the census that jurisdictions already use in redistricting.

- The ACS estimates are reported at a ninety percent confidence level, and the margin of error increases as the sample size—and, thus, the geographic area—decreases. See U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey)*, *available at* https://www.census.gov/glassary/#term_Confidence intervalAmercianCommunitySurvey (last visited November 22, 2017). By contrast, decennial census data is a full count of the population.

- Census data is reported to the census block level, while the smallest unit reported in the ACS estimates is the census block group. See *American Community Survey Data* 3, 5, 10. Accordingly, redistricting jurisdictions and the Department are required to perform further estimates and to interject further uncertainty in order to approximate citizen voting-age population at the level of a census block, which is the fundamental building block of a redistricting plan. Having all of the relevant population and citizenship data available in one data set at the census block level would greatly assist the redistricting process.

For all these reasons, the Department believes that decennial census questionnaire data regarding citizenship, if available, would be more appropriate for use in redistricting and in Section 2 litigation than ACS citizenship estimates.

Accordingly, the Department formally requests that the Census Bureau reinstate into the 2020 Census a question regarding citizenship. We also request that the Census Bureau release this new data regarding citizenship at the same time as it releases the other redistricting data, by April 1 following the 2020 Census. At the same time, the Department requests that the Bureau also maintain the citizenship question on the ACS, since such question is necessary, *inter alia*, to yield information for the periodic determinations made by the Bureau under Section 203 of the Voting Rights Act, 52 U.S.C. § 10503.

Please let me know if you have any questions about this letter or wish to discuss this request. I can be reached at (202) 514-3542, or at Arthur.Gary@usdoj.gov.

Sincerely yours,

/s/ ARTHUR E. GARY
ARTHUR E. GARY
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